85-2036

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNION ELECTRIC COMPANY,
Petitioner,

vs.

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY, a corporation, and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a corporation, individually and as representatives of all of the holders of the $70,000,000 first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of April 11, 1978,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the prospectus adequately disclosed to the bondholders in 1975 at the time of the sale that the bonds were subject to redemption and to refunding at par during the ten-year "no-call" period from cash deposited in the Maintenance Fund and, if not, whether the attempt to exercise the contractual right to redeem bonds at par as announced on April 11, 1978, constituted fraud under the federal securities laws?

II. Whether damages are recoverable on behalf of a class of bondholders that happened to hold the bonds on April 11, 1978, the day the special redemption plan was announced, where it is undisputed that no bonds were redeemed or refunded and the individual and class plaintiffs did not sell any bonds during the period of temporary market decline?

III. Whether the appellate court erred in affirming the judgment on the basis of a fraud theory which was not pled, submitted to the jury, or argued on appeal, and whether the appellate court also erred in affirming the ruling of the District Court in excluding evidence that the bond values fully recovered after the redemption plan was cancelled on June 19, 1978.

LISTING OF PARTIES

Petitioner is:

Union Electric Company, a corporation

Respondents are:

Harold Harris, an individual

Continental Casualty Company, a corporation

National Fire Insurance Company of Hartford, a corporation

A class of bondholders consisting of

All persons, companies and corporations who held first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of the public redemption announcement by Union Electric on April 11, 1978.

Union Electric Company has no parent company, and no subsidiaries other than a wholly-owned subsidiary. Continental Casualty Company and National Fire Insurance Company of Hartford are subsidiaries of CNA Financial, Inc. Rules of the Supreme Court of the United States, Rule 28.1

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Listing of Parties and Statement Under Supreme Court Rule 28.1	ii
Table of Authorities	vii
Opinion and Judgments Below	1
Statement of Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	3
The Proceedings Below	3
Statement of the Facts	5
The Prospectus	5
Florida Power & Light Company's Announcement	6
The Redemption Announcement	6
The Market Drop	7
The Plan Is Cancelled	7
The Excluded Evidence	7
Reasons for Granting the Writ	8
I. The Writ Should Be Allowed Because The Prospectus Disclosed The Exceptions To The "No Call" Feature Of The Bond Contract And Because Of Conflicts Among The Circuits And With Decisions Of This Court On Important Issues Of Federal Securities Law	9

A. Under Well Settled Principles Of Construction, The Prospectus Unambiguously And Adequately Disclosed The Exceptions To The Ten-Year "No Call" Features Of The Bond Contract .. 9

B. The Eighth Circuit's Decision, Holding That A Bond Issuer Can Be Liable Under Section 10(b) And Rule 10b-5 For Attempting To Exercise A Contractual Right, Is In Conflict With The Decision Of Fifth Circuit In *Broad v. Rockwell International Corporation,* With The Second Circuit In *Fershtman v. Schectman* And With A Decision Of The Eighth Circuit On The Same Issue 15

II. The Eighth Circuit's Holding That Plaintiffs Proved Damages By Establishing A "Market Drop" On April 11, 1978, Is In Conflict With The Weight Of Authority And With Section 28(a) Of The Securities Exchange Act And Permits A Damage Award Based On A Mere Paper Loss Following The Announcement Of A Redemption Which Never Took Place 19

III. The Eighth Circuit's Holding That The Class Purchased "In Connection With" The Alleged Fraudulent Conduct Is In Conflict With *Blue Chip Stamps v. Manor Drug Stores* Because The Class Members Were Not Shown To Have Been Purchasers At All, And The Fraudulent Intent Which The Court Found Existed On April 11, 1978 Was Necessarily Subsequent to The Plaintiffs' Acquisition Of Their Bonds..... 20

IV. The Eighth Circuit Erred And Exceeded The Appropriate Scope Of Appellate Review In Substituting A Finding Of Fraud For The Issues Submitted To The Jury And In Affirming The Decision Of The District Court Excluding Vital, Relevant And Material Evidence That The Bonds Fully Recovered Their Market Value After The Redemption Plan Was Cancelled 23

Conclusion 26

Appendix A: Opinion of the United States Court of Appeals for the Eighth Circuit A-1

Appendix B: Judgment of the United States Court of Appeals for the Eighth Circuit, Filed March 24, 1986 ..... A-28

Appendix C: Judgment of the United States District Court for the Eastern District of Missouri, Filed November 14, 1984 ..... A-30

Appendix D: Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing en banc A-31

Appendix E: Order of the United States District Court for the Eastern District of Missouri, Staying Issues Except Claims Based on Rule 10b-5 ..... A-32

Appendix F: Order of the United States District Court for the Eastern District of Missouri, Amending Class Definition For Trial A-33

Appendix G: Opinion of the Missouri Court of Appeals, Eastern District A-36

Appendix H: Portions of March 19, 1975 Final Prospectus A-59

Appendix I: Union Electric Company's Announcement on April 11, 1978 of the Maintenance Fund Deposit for Possible Use in Retiring Bonds A-71

Appendix J: Union Electric Company's Announcement on June 19, 1978, cancelling the Previously Announced Plan to Retire Bonds A-72

Appendix K: First Amended Complaint, as Amended .. A-73

Appendix L: Liability Instructions A-114

Appendix M: Damage Instructions A-118

Appendix N: Jury's Liability Verdict A-119

Appendix O: Jury's Damage Verdict A-120

Appendix P: Fact Summary A-121

TABLE OF AUTHORITIES

Page

Cases:

Associated Builders, Inc. v. Alabama Power Co., 505 F. 2d 97 (5th Cir. 1974) 8, 12

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), *reh. den.*, 423 U.S. 884 (1975) 8, 20, 21, 22

Broad v. Rockwell International Corp., 642 F. 2d 929 (5th Cir. 1981) (en banc), *cert. den.*, 454 U.S. 965 (1981) 8, 13, 16, 17

Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F. 2d 527 (10th Cir. 1962) 19

Fershtman v. Schectman, 450 F. 2d 1357 (2d Cir. 1971), *cert. den.*, 405 U.S. 1066 (1972)..... 8, 17, 19

Franklin Life Insurance Co. v. Commonwealth Edison Co., 451 F. Supp. 602 (S.D. Ill. 1978), *aff'd*, 598 F. 2d 1109 (7th Cir.), *cert. den.*, 444 U.S. 900 (1979) . 8, 14

Harris v. American Investment Co., 523 F. 2d 220 (8th Cir. 1975), *cert. den.*, 423 U.S. 1054 (1976) 19, 25

Harris v. Union Electric Co., 622 S.W. 2d 239 (Mo. App. 1981) 4

Janigan v. Taylor, 344 F. 2d 781 (1st Cir. 1965), *cert. den.*, 382 U.S. 879 (1965) 19

John Hancock Mutual Ins. Co. v. Carolina Power & Light Co., 717 F. 2d 664 (2d Cir. 1983) 11

Kerrigan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 450 F. Supp. 639 (S.D. N.Y., 1978) 21

Leathers v. United States, 471 F. 2d 856 (8th Cir. 1972), *cert. den.*, 412 U.S. 932 (1973) 24

Levine v. Seilon, Inc., 439 F. 2d 328 (2d Cir. 1971) 19

Lincoln National Bank v. Lampe, 414 F. Supp. 1270 (N.D. Ill. 1976) 21

Lucas v. Florida Power & Light Co., 765 F. 2d 1039 (11th Cir. 1985) 8, 10, 11

Madigan, Inc. v. Goodman, 498 F. 2d 233 (7th Cir. 1974) 19

Marsh v. Armada Corp., 533 F. 2d 978 (6th Cir. 1976), *cert. den.*, 430 U.S. 954 22

Mizell v. United States, 663 F. 2d 772 (8th Cir., 1982) .. 24

Morrissey v. National Maritime Union, 544 F. 2d 19 (2d Cir. 1976) 24

Morgan Stanley & Co., Inc. v. Archer Daniels Midland Co., 570 F. Supp. 1529 (S.D.N.Y. 1983) 11

Nye v. Blyth Eastman Dillon & Co., Inc., 588 F. 2d 1189 (8th Cir. 1978) 25

Patton v. Wills, 121 F. 337, 340 (8th Cir. 1903) 24

Rose v. Arkansas Valley Environment & Utility Authority, 562 F. Supp. 1180 (W.D. Mo. 1983) 21

Ross v. A.H. Robins Co., 607 F. 2d 545 (2d Cir. 1979), *reh. den.*, 448 U.S. 911 (1980) 21

Shapiro v. Midwest Rubber Reclaiming Co., 626 F. 2d 63 (8th Cir. 1980), *cert. den.*, 449 U.S. 1079 (1981) 25

St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 562 F. 2d 1040 (8th Cir. 1977), *cert. den.*, 435 U.S. 925 (1978) 8, 17

Superintendent of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6 (1971) 22

Tulley v. Mott Supermarkets, Inc., 540 F. 2d 187 (3d Cir. 1976) 22

United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki, 358 U.S. 613 (1959) 24

Wolf v. Frank, 477 F. 2d 467 (5th Cir. 1973), *cert. den.*, 414 U.S. 975 (1973), *reh. den.*, 414 U.S. 1104 (1973) 19

Yentsch v. Texaco, Inc., 630 F. 2d 46 (2nd Cir. 1980) ... 24

Statutes:

Securities Exchange Act of 1934 §10(b), 15 U.S.C. §78j(b) (1981) 2

Securities Exchange Act of 1934 §27, 15 U.S.C. §78aa (1981) 4

Securities Exchange Act of 1934 §28(a), 15 U.S.C. §78bb(a) (1981) 3

Regulations:

Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 (1985) 2

Other References:

Note, "Reaping the Fruits of an Unrealized Speculation: May a Buyer Who Profits From A Transaction Also Recover Damages Under Rule 10b-5?" 33 *Rutgers L. Rev.* 973-1007 (1981) 19

14 Cyclopedia Federal Practice § 68.78 (3rd Ed. 1983) .. 24

A. Jacobs, 5C, Litigation and Practice Under Rule 10b-5 (2d Ed. 1986 Rev.) Part II 19

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HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY, a corporation, and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a corporation, individually and as representatives of all of the holders of the $70,000,000 first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of April 11, 1978,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Union Electric Company, respectfully prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered on March 24, 1986.

OPINION AND JUDGMENT BELOW

The opinion which is reported at 787 F.2d 355 and the judgment of the Court of Appeals for the Eighth Circuit appear in

Appendices A and B hereto.[1] The judgment of the District Court appears in Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 24, 1986. (App. B) A timely petition for rehearing with a suggestion for rehearing en banc was denied on May 2, 1986. The order denying the petition is attached as Appendix D hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1934 Securities Exchange Act, Section 10(b)

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any National Securities Exchange —
>
> * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors. 15 U.S.C. §78j(b)(1981)

Rule 10b-5

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate

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[1] Unless otherwise indicated, references are to the appropriate Appendix or applicable page reference in the Appendix. Limited references to the Transcript also appear in the Petition [i.e. "Tr. 5, etc."]. The transcript has not been requested.

commerce, or of the mails or for any facility of any national securities exchange,

(a) To employ any device, scheme or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1985).

1934 Securities Exchange Act, Section 28(a)

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

15 U.S.C. § 78bb(a) (1981).

STATEMENT OF THE CASE

The Proceedings Below

This is a class action on behalf of certain bondholders who happened to hold on April 11, 1978, Union Electric Company's

$70,000,000 10½% First Mortgage Bonds, due March 1, 2005 (hereafter, the "bonds" or the "Series 2005 Bonds.")[2] Union Electric Company (hereafter, "petitioner", "Union Electric" or the "Company") on April 11, 1978, announced a plan to retire a portion of the bonds at par out of cash deposited to the Maintenance Fund under its mortgage. (App. I)

On May 9, 1978 Harold Harris, an original purchaser of twelve of the bonds, filed suit in the St. Louis County Circuit Court, individually and on behalf of the individuals who then held the bonds, seeking declaratory and injunctive relief to stop the redemption plan. On June 19, 1978, Union Electric cancelled the redemption, and none of the bonds were redeemed or refunded. (App. J) In the state court action, the Missouri Court of Appeals, Eastern District, held that petitioner had the contractual right to redeem and to refund the bonds in the manner it had proposed. *Harris v. Union Electric Company,* 622 S.W.2d 239 (Mo. App. 1981). (App. G)

On February 11, 1980, Harold Harris, Continental Casualty Company and National Fire Insurance Company filed this federal class action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission alleging "two separate instances of fraud" which they characterized as "disclosure fraud and transaction fraud". (A-7) Jurisdiction was invoked under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1981). Because of the pendency of the state court class action, the only issue tried in the federal case was the Rule 10b-5 claim in Count

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[2] The class consisted of all "persons, companies and corporations who held first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of the public redemption announcement by Union Electric Company on April 11, 1978 (App. F). Following notice to this class, 194 bondholders holding 2,094 of the bonds opted out of the suit, leaving a class of more than 1,500 individual bondholders holding $67,909,000 of the principal amount of the bonds. (A-4)

II of the Amended Complaint. (App. E and A-73 to A-105). Prior to the commencement of the trial, the managing underwriters, representing the syndicate of investment bankers, who were also named as defendants settled and were dismissed from the suit. The jury, in a bifurcated trial, having found liability based upon damages "in a general sense" (App. L, Inst. No. 13) awarded plaintiffs $2,716,240.00, or $40 in damages for each $1,000 face value of the bonds. (i.e. 67,906 x $40 = $2,716,240). (Appendices B, L, N, and O)

Statement of the Facts

Plaintiff Harold Harris, one of the class representatives, relying on the prospectus, purchased twelve bonds at par value or $1,000 a bond in 1975 for a total investment of $12,000. Continental Casualty Company and National Fire Insurance Company, are subsidiaries of CNA Financial, Inc., a company, which holds in its various insurance subsidiaries more than a billion dollars in fixed income obligations. Continental Casualty Company purchased 1,000 bonds in two transactions — 500 bonds at 98.25% of par or $491,000, and 500 bonds at 102% of par, or $510,000. (App. A-2). National Fire Insurance Company purchased 3,000 bonds in three transactions — 1,000 bonds at 100.55% of par, or $1,005,000; 1,500 bonds at 100.5625% or $1,508,437.50 and 500 bonds at 100.25% or $501,250. (A-2)

The Prospectus

Union Electric routinely issues first mortgage bonds under the terms of its open ended utility mortgage to obtain capital to fund corporate commitments. The Series 2005 Bonds were offered to the public on March 19, 1975 on the basis of a registration statement and prospectus and through a syndicate of underwriters who purchased the bonds from petitioner for resale to the public. (App. H)

In negotiations with the underwriters in 1975, petitioner agreed to pay 10½% interest on the bonds and to a 10-year "no call" restriction. (App. H; A-59; A-60; A-64; A-65) The prospectus describes the bond contract including the "no call" limitation, the Improvement Fund and the Maintenance Fund, and incorporates the mortgage by reference. (App. H) At the time of the sale in 1975, Union Electric officials, the underwriters and the investors were all unaware of any means to redeem or to refund the bonds with borrowed funds having a lower interest cost prior to 1985.[3]

Florida Power & Light Company's Announcement

On March 23, 1977, Florida Power & Light Company announced a plan to redeem its high common bonds which were also sold in 1975, out of cash deposited to the replacement fund under its mortgage. After that announcement, petitioner's officers began to study the possibility of a redemption of the 10½% bonds through a cash deposit to the Maintenance Fund.

The Redemption Announcement

On April 11, 1978, petitioner announced its intention to redeem approximately $50,000,000 of the $70,000,000 of its Series 2005 Bonds. (App. I) Petitioner borrowed approximately $50,000,000 in short-term borrowings at an effective annual interest cost of less than 10.60% and deposited $49,187,000 in cash with the Trustee for its 1978 Maintenance Fund deposit and $700,000 in cash for its Improvement Fund deposit. The Trustee was directed to redeem a like amount of the bonds at par or 100% of face value. The interim short-term debt was to be retired as soon as a private placement of a long-term mortgage bond issue at 9.35% could be completed. The Company's actions and the features of the mortgage are described in detail in the opinion of the Missouri Court of Appeals. (App. G)

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[3] A summary of the facts with appropriate transcript reference is included in Appendix P.

The Market Drop

The day following the April 11, 1978 announcement of the intention to call a portion of the bonds at par or $1,000 a bond, the market value of the bonds, which had been trading at about 113 or $1,130 a bond, fell to about 101 or $1,010 a bond. After the market drop, Mr. Harris' twelve bonds had a market value of $12,120, and the 4,000 bonds held by the corporate plaintiffs had a market value of $4,040,000.[4]

The Plan Is Cancelled

The plan was cancelled on June 19, 1978, and none of the bonds were redeemed or refunded. (App. J, A-3) Neither Mr. Harris nor the corporate plaintiffs sold their bonds between April 11, 1978 and June 19, 1978, and there was no evidence that any class members had done so. (App. H)

The Excluded Evidence

Union Electric offered to prove at trial that, after the cancellation of the redemption plan on June 19, 1978, the Series 2005 Bonds traded like any other utility bonds of like grade and yield and were indistinguishable in market price from other BAA utility bonds of like yield (Tr. 9-82 - 9-85). The District Court excluded this evidence on the ground that what occurred after April 11, 1978, was irrelevant. (A-26, A-27)

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[4] The class representatives did not claim an "out of pocket" loss. Richard Dubberke, a vice-president and bond purchaser for CNA Financial, Inc. and an officer of Continental and National, testified, over objection, that, in his opinion, the bonds would have been priced to yield a higher amount in 1975 had the bondholders known then what they learned in 1978 [Tr. 9-26, 9-27, 9-29, 9-30]. He stated that the difference in yield required a reduction in the price of the bonds in 1975 equivalent to the "market drop" (12 x 70,000 = $8.4 million). Instruction 9 directed the jury to award damages based upon the "difference between the price which the Series 2005 Bonds were sold on March 19, 1975, and the fair price for which the Bonds would have been sold if the information that was misrepresented or not disclosed had then been known." (App. M; Inst. 9)

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted for several important reasons. The decision improperly construes the prospectus which disclosed the exception to the "no call" period relied upon by the Company on April 11, 1978 in announcing the plan to redeem bonds at par. (App. H) *Lucas v. Florida Power & Light Co.*, 765 F. 2d 1039 (11th Cir. 1985); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F. 2d 97 (5th Cir. 1974); and *Franklin Life Insurance Co. v. Commonwealth Edison Co.*, 451 F. Supp. 602 (S.D. Ill. 1978), *aff'd*, 598 F. 2d 1109 (7th Cir.), *cert. den.*, 444 U.S. 900 (1979). The opinion decides a federal question in a way in conflict with decisions of other federal courts of appeals on a recurring and important issue of federal securities law, namely, whether the exercise of a contractual right constitutes fraud under Rule 10b-5. Prior to this decision, the Fifth and Second Circuits reached directly contrary results, as did the Eighth Circuit. *Broad v. Rockwell International Corp.*, 642 F. 2d 929 (5th Cir. 1981) (en banc), *cert. den.*, 454 U.S. 965 (1981); *Fershtman v. Schectman*, 450 F. 2d 1357 (2d Cir. 1971); and *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F. 2d 1040 (8th Cir. 1977), *cert. den.*, 435 U.S. 925 (1978). The decision holds that the announcement of an intent to exercise a valid contractual right to redeem bonds of which petitioner was previously unaware constitutes a securities fraud and fixes damages at that instant, regardless of whether the right is exercised. This novel definition of fraud will necessarily have a significant impact on the rights of utilities and others to redeem or to refund high coupon debt in order to reduce costs. The opinion also decides a federal question in a way in conflict with the Blue Chip Stamps doctrine enunciated by this Court in permitting recovery on behalf of a class of bondholders who happened to hold the bonds three years after the original sale without any showing that the class members purchased the bonds "in connection with" the alleged fraud. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The decision also permits recovery

of substantial damages for a temporary "market drop" or paper loss without any evidence that the bondholders sustained actual damages in direct conflict with the applicable federal statute and the weight of authority. 15 U.S.C. § 78bb(a). The jury, moreover, was denied relevant and material evidence that the market value of the bonds fully returned after the redemption plan was cancelled on the basis of a judicially created rule which precludes the admission of relevant and material evidence on damages, an issue which should be finally resolved by this Court. Finally, in affirming the judgment on a fraud claim which was neither pled, submitted to the jury or argued on appeal, the appellate court has departed from the accepted and usual course of judicial proceedings and exceeded the appropriate scope of review denying petitioner a trial and an appeal on the issues presented.

I.

The Writ Should Be Allowed Because The Prospectus Disclosed The Exceptions To The "No Call" Feature Of The Bond Contract And Because Of Conflicts Among The Circuits And With Decisions Of This Court On Important Issues Of Federal Securities Law

A. Under Well Settled Principles Of Construction, The Prospectus Unambiguously And Adequately Disclosed The Exceptions To The Ten-Year "No Call" Features Of The Bond Contract.

Union Electric relied upon the prospectus in announcing the call on April 11, 1978. One of the claims made by plaintiffs was that the petitioner fraudulently misrepresented and omitted material facts relating to the redemption provisions of the bond contract. The "disclosure fraud" claim was submitted to the jury. (App. L; Inst. 13) The Eighth Circuit held (at A-21 of the Opinion) that Union Electric officials had "no intent to defraud when they represented that the bonds possessed ten year call

protection . . . ." The "transaction fraud" claim (A-7) was abandoned and never submitted to the jury (App. L). In Instruction 9, the jury was informed that "Union Electric had a contractual right under the Bond Indentures to redeem the Bonds in the manner it attempted in April, 1978." (App. L).

Union Electric contends that the prospectus does disclose the exceptions to the "no-call" features of the bond contract. See, Cover Page of Prospectus (A-59); "The Issue In Brief" (A-60); and "Description of New Bonds" (A-64, A-65) Plaintiffs and petitioner argued that the prospectus language had exactly opposite meanings. Plaintiffs claimed that special redemptions through refundings were prohibited during the "no call" period while Union Electric argued they were permitted. The Opinion (at p. A-11) concludes that *both* "interpretations of the cover page are plausible . . . ." (A-11) This conclusion cannot be supported by the language of the prospectus, and petitioner suggests that a comparison of the opinion with the applicable pages of the prospectus should suffice to require reversal on this issue alone. The Eighth Circuit relied upon testimony relating to the "intentions of the parties" in 1975 (A-12) that the bonds had "solid protection" against call to find ambiguities in the prospectus. (A-15) The bondholders were, however, advised of the features of the bond contract in the prospectus which also incorporated by reference the applicable indentures. Because the appellate court erred in its interpretation of the prospectus and misapplied well-settled principles of construction, this Court should review this decision at this time.

The Eleventh Circuit addressed very similar issues in *Lucas v. Florida Power & Light Company,* 765 F.2d 1039 (11th Cir. 1985). As shown by the financial articles quoted in that opinion, 765 F. 2d at 1042, the Florida Power & Light redemption in 1977 astonished the investment community and brought to the attention of other utilities the possibility of redeeming bonds through the Maintenance Fund. The testimony at trial of the instant case was that Union Electric officials were not aware of the possibility of a maintenance fund redemption until after

Florida Power & Light Company redeemed its bonds, and not until that time did Union Electric begin considering whether to redeem its own Series 2005 Bonds out of the Maintenance Fund.[5]

In the *Florida Power & Light* case, the Eleventh Circuit affirmed the trial court's finding that the prospectus disclosed that all or a portion of the bonds were subject to redemption and that it employed customary "boilerplate" utility bond prospectus language for disclosing those special redemption rights. 765 F. 2d at 1044. One of the contentions made by plaintiffs in the *Florida Power & Light* case was that the terms "special redemption price" and "regular redemption price" were misleading, the same contention made by plaintiffs in the present case. (A-14) The court found no ambiguity in the use of standard boilerplate language and concluded that "[t]he *possibility* of a special redemption was clear on the face of the prospectus, the *vulnerability* or likelihood of such a redemption was a matter of speculation at the time." 765 F.2d at 1045.

The Eighth Circuit distinguished the *Florida Power & Light* case on the ground that it involved a redemption rather than a refunding and that "FP&L's prospectus clearly indicated that the five-year-call protection applied to *lower cost refunding*, but *not* to *redemptions*." (A-23)[6] But the *Florida Power & Light*

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[5] Two other utilities also redeemed bonds after Florida Power & Light's redemption. The lawsuits which followed were based on contract questions and were decided in favor of the utilities. *John Hancock Mutual Ins. Co. v. Carolina Power & Light Co.*, 717 F. 2d 664 (2d Cir. 1983); *Morgan Stanley & Co., Inc. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529 (S.D. N.Y. 1983).

[6] In fact, the *Florida Power & Light* court stated only that the five year protection extended to general redemption through refunding. 765 F. 2d at 1041, n. 7. The Eleventh Circuit did not discuss refunding at the special redemption price, since there had been no refunding at all. The District Court had stated that, even if a refunding had taken place, the limitation on refundings did not apply to redemptions at the special redemption price. *Lucas v. Florida Power & Light Co.*, 575 F. Supp. 552, 567 (S.D. Fla. 1983).

decision is indistinguishable in terms of its holding on the standard to be applied in reviewing the sufficiency of a prospectus. The only representations either Union Electric or Florida Power & Light made concerning redemption and refunding were those in the prospectus. The Eleventh Circuit looked to the language of the prospectus itself to determine whether the statements made, when read as a whole in light of the circumstances in which they were made, contained misrepresentations or omissions. 765 F. 2d at 1045. Although it noted that the class "believed or assumed" the bonds were not redeemable except at the high rate during the "no-call" period, the Eleventh Circuit did not rely on the investors' beliefs or expectations about the bonds and in fact stated that "the class' fundamental complaint appears the normal human outrage at occurrence of an event widely believed unlikely to occur." 765 F. 2d at 1046. The Eighth Circuit's construction based on the parties' beliefs in 1975 and on what appear to be the court's own conclusions about whether the contract as written makes sense, is in conflict with the Eleventh Circuit's approach.

The Eleventh Circuit relied on the decision in *Associated Builders, Inc. v. Alabama Power Company,* 505 F.2d 97 (5th Cir. 1974). That case under the 1933 Securities Act also involved a redemption at par of a utility's bonds, although the bonds in that case were redeemed through a sinking fund. The Alabama Power prospectus stated on the cover page that:

> The bonds are redeemable at the redemption prices set forth on page 27; however, no bonds may be redeemed at a regular redemption price prior to November 1, 1975 for the purpose of refunding at an effective interest cost of less than 9.07%.

This statement omitted the exception, that the bonds could be redeemed through lower interest cost funds if redeemed through the operation of the improvement or maintenance and replacement provisions of the mortgage. That information was disclosed at page 27 of the prospectus. The Fifth Circuit held as a mat-

ter of law that the prospectus was not misleading and that plaintiffs failed to state a claim under the federal securities laws:

> Although the introductory statement on the cover page was, taken by itself, incomplete, it did not purport to be either complete or self-explanatory. It did omit information that the call protection described was limited to redemptions made *otherwise than by operation of the sinking fund,* but that fact was supplied on page 27 of the prospectus. (Emphasis ours.) 505 F. 2d at 101.

The court emphasized that the statement on the cover page had to be read in context, in light of the circumstances in which it was made, and that when so read it was not misleading, nor was the prospectus as a whole. The court concluded that as a matter of law the prospectus was not misleading, despite the omission on the cover page, and that plaintiffs' complaint failed to state a claim under the federal securities laws. In the instant case, the disclosures appear at three places including the cover page of the prospectus. (App. H)

The case of *Broad v. Rockwell International Corp.*, 642 F. 2d 929 (5th Cir. 1981) (en banc) *cert. den.*, 454 U.S. 965 (1981), also involved the operation of a little known and seldom applicable provision of a bond indenture. The Fifth Circuit's description of the preparation of the Indenture is applicable to the Indenture in the present case:

> The Indenture that emerged for the . . . offering was only partially the result of actual negotiations between the parties . . . . The remainder of the indenture is invariably made up of boilerplate provisions that typically are not discussed at all by either the representatives of the issuer or those of the lead underwriter; indeed, most of those provisions are not even discussed by counsel for the respective parties, and many of them are required by federal law to be inserted into the indenture verbatim. 642 F. 2d at 962.

Observing that the testimony in the record indicated that the parties thought themselves to be under no legal duty to disclose in detailed fashion the indenture's provisions for more remote future contingencies, the court held that there was evidence of nothing more than simple negligence by the defendants in failing to disclose the workings of a particular section in the indenture. A directed verdict for defendant was affirmed.

The Eighth Circuit's decision is also in conflict with the holding in *Franklin Life Insurance Company v. Commonwealth Edison Company*, 451 F. Supp. 602 (S.D. Ill. 1978), *aff'd.*, 598 F. 2d 1109 (7th Cir.), *cert. den.*, 444 U.S. 900 (1979). That case involved a redemption of preferred stock from the proceeds of subsequently issued common stock. Like the bonds in the present case, the preferred stock had been trading on the exchanges at prices above the redemption price ($110). The stock was trading at about $119 per share when Commonwealth Edison announced its intent to redeem the bonds. After the announcement, the price fell to about $111, approximating the redemption price plus accrued dividends. The court emphasized that in order to establish an omission under Rule 10b-5, plaintiffs were required to show "that defendant omitted a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 451 F. Supp. at 608-09. The material facts assertedly omitted were not objective but subjective, involving matters of defendant's intent and defendant's beliefs concerning the proper interpretation of the redemption provision. The District Court held, 451 F. Supp. at 609, that the prospectus did not reveal any intent to mislead or any recklessness, and the Seventh Circuit in a per curiam opinion adopted as its own the opinion of the District Court with the exception of two paragraphs not relevant here. The above cases suggest the necessity of final review by this Court on the disclosure issues in the prospectus.

B. The Eighth Circuit's Decision, Holding That A Bond Issuer Can Be Liable Under Section 10(b) And Rule 10b-5 For Attempting To Exercise A Contractual Right, Is In Conflict With The Decision Of Fifth Circuit In *Broad v. Rockwell International Corporation*, With The Second Circuit In *Fershtman v. Schectman* And With An Eighth Circuit Decision On The Same Issue.

The Court of Appeals for the Eighth Circuit held that the evidence was sufficient for the jury to have found that Union Electric's activities between March of 1975 and June of 1978 constituted a scheme or course of business that operated as a fraud upon the bondholders. The court stated:

> Although U.E. officials had no intent to defraud when they represented that the bonds possessed ten-year-call protection, they certainly intended to defraud the bondholders of this protection when they announced the plan to call the bonds before the 10 year period had run. (A-21)[7]

The court concluded:

> We believe that the plan to call the bonds in these circumstances is within the range of ingenious devices used to manipulate securities that Congress intended to prohibit. (A-22)

The Eighth Circuit relied for its finding of fraud in 1978 on testimony by several officials that the company initially intend-

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[7] The Eighth Circuit's statement (A-21) that there is substantial evidence demonstrating that U.E. knew that the plan was contrary to its representation in the prospectus concerning the call protection, is inaccurate. There was substantial evidence that U.E. knew that the plan was contrary to the expectations of the investors and to what Union Electric officials had believed when the bonds were issued in 1975. However, there was no evidence that any Union Electric official knew or believed that the prospectus failed to adequately disclose the redemption and refunding exceptions. (App. P)

ed to provide "solid protection" against call for 10 years, (A-15) on evidence that one of the advisory directors questioned whether the plan to redeem amounted "to subordinating moral responsibility for financial gain" and advised that unless the reasons were clear and compelling, the "contract with the bondholders should be kept inviolate", (A-21) and on testimony that the plan was contrary to the protection that the underwriters, the bondholders, and Union Electric all mutally intended the bonds to possess. (A-21)

The Eighth Circuit's reasoning appears to be that Union Electric, the bondholders and the underwriters intended the bonds to have a greater protection against call than the indenture in fact provided and that Union Electric "intended to defraud the bondholders of this protection" which they did not have under the contract and therefore acted with scienter to violate Rule 10b-5. The court stated:

> It was U.E.'s intent that the bonds would possess solid protection against call for 10 years. To represent and market the bonds as possessing such protection, and then implement a plan to call the bonds within the 10 year period, constitutes at the very least recklessness on U.E.'s part. (A-22, n. 12)

This definition of scienter is without support in the language of Section 10(b) and Rule 10b-5 legislative history of the securities laws and is in conflict with the decision of the Fifth Circuit in *Broad v. Rockwell International Corp.*, 642 F. 2d 929 (5th Cir. 1981) (en banc) *cert. den.*, 454 U.S. 965 (1981).

In *Broad v. Rockwell,* the court rejected plaintiffs' claim that defendants had schemed to defraud the debenture holders of their right to convert the debentures into common stock and had substituted a right to convert into cash. Although the prospectus did not clearly disclose the workings of an indenture provision concerning conversion rights in the event of a merger, and although the indenture provision was contrary to what the debenture holders expected, the court stated:

> We have concluded in part II of this opinion, *supra,* that as a matter of law, the holders of Debentures received in the supplemental indenture all to which they were contractually entitled under the Indenture. There is no doubt but that there was concerted, intentional conduct by the defendants to bring about that result. But as a matter of law, there was no violation of section 10(b) or Rule 10b-5 because there was no fraud . . . It is elementary that section 10(b) and Rule 10b-5 reach only conduct involving manipulation or deception . . . The defendant's conduct involved neither; they merely carried out their contractual obligations. As a conceptual matter, they could not have fraudulently schemed to deprive the holders of Debentures of a right that those holders did not in fact have. 642 F. 2d at 963[26]

The Eighth Circuit (A-15, n.8) attempted to distinguish *Broad* and *St. Louis Union Trust Company v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 562 F.2d 1040 (8th Cir. 1977), *cert. den.,* 435 U.S. 925 (1978), on the grounds that in the present case the parties' intentions were contrary to the subsequently construed contractual right. Regardless of the parties' intent to provide a protection which was not in fact in the contract, the announcement of an intent to exercise the subsequently discovered right cannot constitute a fraud in violation of Rule 10b-5, especially when the plan to exercise the right is cancelled, and it is never in fact exercised.

Prior to the Eighth Circuit's decision in this case, no court had ever held that the exercise of a contractual right, much less the announcement of an intent to exercise that right, could constitute a fraud in violation of the federal securities laws. In fact, the Fifth Circuit in *Broad v. Rockwell* and the Eighth Circuit in its prior decision in *St. Louis Union Trust Company v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* had held that it did not. See also *Fershtman v. Schectman,* 450 F.2d 1357 (2d Cir. 1971), in which limited partners brought suit under Rule 10b-5, com-

plaining of the termination of the partnership and alleging misrepresentations and nondisclosures concerning termination. The court affirmed dismissal, holding that plaintiffs' complaint did not state a claim under the federal securities laws and that the court had no jurisdiction:

> If defendants were legally entitled to terminate the partnership on March 31, 1968, in their sole discretion, it would make no difference what they misrepresented or concealed, even if we assume in plaintiff's favor that this transaction constituted a sale. 450 F. 2d at 1360.
>
> * * *
>
> Plaintiffs' efforts to bring themselves within the rule applied by some courts in favor of defrauded sellers confront the obstacle that if the partnership agreement governed, there was no fraud in connection with what they term a forced sale. 450 F. 2d at 1361.

For the above reasons, it is essential that this Court determine whether the exercise of a contract right, of which the bond issuer was unaware at the time the bonds were issued, or the announcement of an intent to exercise such a right, constitutes a fraud in violation of Rule 10b-5, as the Eighth Circuit held in this decision, or whether, as the Fifth and Second Circuits have held and as the Eighth Circuit previously held, an issuer, as a matter of law, cannot fraudulently scheme to deprive securities holders of a right which the holders did not in fact have.

II.

The Eighth Circuit's Holding That Plaintiffs Proved Damages By Establishing A Temporary "Market Drop" On April 11, 1978 Is In Conflict With The Weight Of Authority And With Section 28(a) Of The Securities Exchange Act And Permits A Damage Award Based On A Mere Paper Loss Following The Announcement Of A Redemption Which Never Took Place

To the extent that the Eighth Circuit holds that the announcement of the plan to call the bonds, which precipitated the "market drop", caused plaintiffs damages, its decision is in conflict with Section 28(a) of the Securities Exchange Act, 15 U.S.C. §78bb(a) which limits recovery to "actual damages" on account of the act complained of. The well-established rule in securities fraud cases is that the defrauded buyer is entitled to recover only his out-of-pocket loss, namely, the excess of what he paid over the value of what he got. Under this test, the plaintiffs and the class did not sustain any actual damages. *Levine v. Seilon, Inc.*, 439 F. 2d 328, 334 (2d Cir. 1971) *Fershtman v. Schectman*, 450 F. 2d 1357, 1361 (2d Cir. 1971); *Janigan v. Taylor*, 344 F. 2d 781, 786 (1st Cir.), *cert. den.*, 382 U.S. 879 (1965); *Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F. 2d 527, 533 (10th Cir. 1962); *Wolf v. Frank*, 477 F. 2d 467, 478-79 (5th Cir., 1973), *cert. den.*, 414 U.S. 975 (1973); *Madigan v. Goodman*, 498 F. 2d 233, 239 (7th Cir. 1974); *Harris v. American Investment Co.*, 523 F. 2d 220, 225 (8th Cir. 1975), *cert. den.*, 423 U.S. 1054 (1976). The decision in this case permits a damage award based on a paper loss for a redemption which never occurred. *Wolf v. Frank*, 477 F. 2d 467, 478 (5th Cir. 1973), *cert. den.*, 414 U.S. 975 (1973) ("Rule 10b-5 only provides for recovery of actual damages . . . not for loss of speculative profits.) See, "Reaping the Fruits of an Unrealized Speculation: May a Buyer Who Profits From A Transaction Also Recover Damages Under Rule 10b-5?" 33 *Rutgers L. Rev.* 973-1007 (1981); A. Jacobs, 5C, Litigation and Practice Under Rule 10b-5 (2d ed. 1986 Rev.) Part II.

This unique measure of damages, now adopted by the Eighth Circuit, seriously undermines the "actual damages" limitation of the Securities Exchange Act and the consistent decisions of this Court and other federal courts in upholding that standard. One of the reasons stated in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975), for the "purchaser or seller" requirement is that damages for a violation of Rule 10b-5 are limited to actual damages, and allowing persons who neither purchased nor sold the securities to bring an action under Rule 10b-5 would lead to speculative damage claims. The effect of the Eighth Circuit's decision is to allow a substantial damage award for any temporary market drop, no matter how brief, and regardless of the fact that the securities holder neither bought nor sold during the "market drop" period. This unusual result depends upon the "second investment decision" doctrine which has been developed by the Eighth Circuit and is addressed at p. 24 of this petition.

III.

The Eighth Circuit's Holding That The Class Purchased "In Connection With" The Alleged Fraudulent Conduct Is In Conflict With *Blue Chip Stamps v. Manor Drug Stores* Because The Class Members Were Not Shown To Have Been Purchasers At All, And The Fraudulent Intent Which The Court Found Existed On April 11, 1978 Was Necessarily Subsequent To The Plaintiffs' Acquisition Of Their Bonds

The Eighth Circuit's affirmance of the judgment in favor of a class who were neither defined as nor shown to have been purchasers of the bonds is in conflict with this Court's decision in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975). In *Blue Chip Stamps,* this Court held that only "purchasers and sellers" of securities have standing to sue for violation of Rule 10b-5. 421 U.S. at 733-34. Persons who acquired their securities by gift, by devise or inheritance, or by any means

other than purchase, are excluded as plaintiffs. See *Rose v. Ark. Valley Environmental & Utility Authority,* 562 F. Supp. 1180, 1188-89 (W.D. Mo. 1983); *Kerrigan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 450 F. Supp. 639, 646-47 (S.D. N.Y. 1978); and *Lincoln Nat. Bank v. Lampe,* 414 F. Supp. 1270, 1280-81 (N.D. Ill. 1976). However, the class in the present case was not defined as a class of purchasers.[8] Cf. *Ross v. A.H. Robins Co.,* 607 F. 2d 545 (2d Cir. 1979), where the court defined the class as persons who purchased the stock between certain dates and still owned shares of stock at the end of the period and suffered damages as a result thereof. The class in the present case was defined merely as *holders* of the bonds:

> All of the holders of the $70,000,000 First Mortgage Bonds of Union Electric Company, 10½% Series due March 1, 2005 as of April 11, 1978.

The Eighth Circuit addressed this issue only briefly, stating, without reference to any evidence.

> We believe that the members of the class who held the bonds on April 11, 1978 dealt in the security to which the omissions concerning the call protection relate. (A-20, n. 8)

The flaw in this approach is that while this Court in *Blue Chip Stamps* explained its ruling by stating that it "limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates," 421 U.S. at 747, the very next sentence makes it clear that the necessary "dealing in the security" must be "by way of purchase or sale." To substitute a general "dealing in the security" test for the specific purchaser or seller requirement is

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[8] At no time were all of the bonds subject to redemption. (App. J) Consequently the class, as defined, could not claim that their bonds would in fact have been redeemed.

to adopt the very case-by-case determination which this Court in *Blue Chip Stamps* rejected as an unsatisfactory basis for a rule of liability imposed on the conduct of business transactions. 421 U.S. at 755.

One of the reasons stated in *Blue Chip Stamps* for the rule that only purchasers or sellers of securities may maintain a private cause of action for money damages under Rule 10b-5 is that both Section 10(b) and Rule 10b-5 are directed toward injuries suffered "in connection with the purchase or sale of any security." 421 U.S. at 733. In adopting a different standard of "dealing in the security", the Eighth Circuit has eroded the "in connection with" requirement. The Eighth Circuit relied on language in *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6 (1971).

The Eighth Circuit, observing that the court in *Bankers Life* did not explain what constitutes "touching" a security transaction, nonetheless concluded "that U.E.'s fraudulent conduct 'touches' the class members' purchases of their bonds." (A-20) The Eighth Circuit reasoned that the market price of the bonds reflected the misleading call protection and that the class members, if the call protection had been accurately disclosed, would have paid less for the bonds or demanded a higher yield.[9]

This theory also ignores the "in connection with" requirement by substituting a new and undefined standard. Following *Blue Chip Stamps,* lower courts have held that the purchase or sale requirement contemplates a causal connection between the alleged fraud and the purchase or sale. *Tulley v. Mott Supermarkets, Inc.*, 540 F. 2d 187, 194[2] (3d Cir. 1976). In *Marsh v. Armada Corp.*, 533 F. 2d 978, 981, n. 3 (6th Cir. 1976), the court stated:

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[9] This is factually inaccurate, because it was not shown that the class members purchased the bonds at the time they were issued in 1975. Once the syndicate broke, the bonds traded at market prices which reflected changes in the market interest rate and the class constantly changed.

> Although the presence of reliance goes to the sufficiency of the complaint, standing is not accorded to a plaintiff if his purchase or sale occurs before the alleged fraudulent conduct, or after the alleged fraudulent conduct was exposed . . . because in such situations reliance clearly could not exist.

In the present case, the 1978 redemption announcement, which the Court of Appeals found was the fraud, occurred after the plaintiffs' acquisition of their bonds. Although the Eighth Circuit refers to a continuous fraud from March, 1975 through June, 1978, it found no intent to defraud until April 11, 1978, when the plan to call the bonds was announced. (A-21) The opinion also makes it clear that in the Court's view, it was "U.E.'s conduct in announcing its plan to call the bonds, which rendered the representations in the prospectus misleading." (A-19) Because the decision misapplies or erodes the *Blue Chip Stamps* rule, this Court should review and correct this error at this time.

IV.

The Eighth Circuit Erred And Exceeded The Appropriate Scope Of Appellate Review In Substituting A Finding Of Fraud For The Issues Submitted To The Jury And In Affirming The Decision Of The District Court Excluding Vital, Relevant And Material Evidence That The Bonds Fully Recovered Their Market Value After The Redemption Plan Was Cancelled

A. The Appellate Court Exceeded The Proper Scope of Review

Because the Opinion (A-7) relies upon a factual determination which was neither presented at trial nor relied upon in this appeal, petitioner will be denied a right of trial by jury under the 7th Amendment of the Constitution and a right to an appeal unless this Court exercises its supervisory authority. (App. L; Inst. No. 13)

The Court's Opinion acknowledges that there ws no intent to defraud the bondholders in 1975 (A-21) and then adopts as its factual finding a theory of fraud from 1975 to 1978 (A-7, A-14-15, A-21, A-24) which issue was not pled, submitted to the jury, argued by plaintiffs or supported by any facts in the record. (Cf. App. K and App. L&M) In effect, the Court substitutes its finding of fraud for the two claims which were presented at trial albeit only one of the issues relating to disclosures in the prospectus was submitted to the jury. (App. L) It has been repeatedly held that ". . . a judgment cannot be entered by an appellate court where it must be based on facts which are triable only by a jury, and which have not been so tried." 14 Cyclopedia of Federal Practice § 68.78 (3rd Ed. 1983); *Mizell v. United States,* 663 F.2d 772, 776 (8th Cir. 1981); *Leathers v. United States,* 471 F.2d 856, 858 (8th Cir. 1972).

Because plaintiffs neither pled nor submitted the fraud claim relied upon by the Eighth Circuit in its Opinion and there was a failure of proof on the issue of scienter in 1975 as indicated by the Opinion, it necessarily follows that the judgment cannot stand and must be set aside. *Yentsch v. Texaco, Inc.,* 630 F.2d 46 (2d Cir. 1980); *United New York and New Jersey Sandy Hook Pilots Association v. Halecki,* 358 U.S. 613, 619, (1959); *Morrissey v. National Maritime Union,* 544 F.2d 19, 26-27 (2d Cir. 1976); *Patton v. Wells,* 121 F. 337, 340 (8th Cir. 1903). Because of this unusual departure from the proper scope of review, petitioner respectfully submits that this Court should exercise its supervisory authority to prevent a miscarriage of justice and to at least afford petitioner the opportunity to be heard specifically on this issue.

B. The "Second Investment Decision" Rule Should Be Finally Reviewed By This Court Because It Excludes From The Jury's Consideration Relevant Evidence Relating To Damages.

It is clear from the opinion that what the Eighth Circuit viewed as the damage was the "market drop" itself, (A-18, A-19)

because the Court held inadmissible Union Electric's offer of proof that, after cancellation of the call, the Series 2005 Bonds traded like any other bonds of the same grade and yield and were indistinguishable in value from bonds with indentures which did not permit maintenance fund redemption or refunding. The Eighth Circuit, relying on *Harris v. American Investment Company,* 523 F. 2d 220 (8th Cir. 1975), *cert. den.,* 423 U.S. 1054 (1976), held the exclusion by the District Court was proper.[10] The Court in *Harris v. American Investment Company* while referencing the "out of pocket" rule for damages held that the investor was under no duty to mitigate his damages by selling the stock after discovering the fraud, because "by continuing to hold the securities after the discovery of the fraud the investor has, in effect, made a second investment decision unrelated to his initial decision to purchase the [securities]." 523 F. 2d at 228. The Eighth Circuit concluded (A-27) that in the present case the bondholders made a "second investment decision" when they decided to hold the bonds after the plan was announced and the market value of the bonds had plunged:

> The recovery of the bonds two months later, and the continued receipt of interest payments has no bearing on the measure of plaintiffs' damages caused by U.E.'s fraudulent conduct. (A-27)

Aside from the fact that there was no evidence that the class of bondholders who held the bonds made an investment decision, the Eighth Circuit decision is in conflict with the language and purpose of the Securities Exchange Act, with the applicable rules of evidence and raises an important question requiring the final consideration by this Court.

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[10] The Eighth Circuit also cites *Nye v. Blyth Eastman Dillon & Co., Inc.,* 588 F. 2d 1189 (8th Cir. 1978). The only other court of appeals decision which mentions the "second investment" rule is *Shapiro v. Midwest Rubber Reclaiming Co.,* 626 F. 2d 63 (8th Cir. 1980).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1252

Harold Harris, et al.,
Appellees,

vs.

Union Electric Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: October 16, 1985
Filed: March 24, 1986

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Harold Harris, Continental Casualty Company, and National Fire Insurance Company of Hartford, individually and on behalf of a class of bondholders, brought this action against Union Electric Company alleging violations of section 10(b) of the Securities Exchange Act and of Rule 10b-5 of the Securities Exchange Commission with respect to the issuance and propos-

ed call of the First Mortgage Bonds of Union Electric Company. The district court[1] entered judgment on a jury verdict awarding the class $2,716,240. Union Electric Company appeals, and for reversal it argues that 1) the plaintiffs' claims are barred by the statute of limitations; 2) insufficient evidence exists to sustain the jury's verdict on the plaintiffs' section 10(b) and Rule 10b-5 claims; 3) the court erroneously instructed the jury with respect to liability and damages; and 4) the court erroneously excluded evidence regarding market value and interest payments made after the plan to call the bonds was cancelled. For the reasons discussed below, we affirm the district court's judgment.

I. BACKGROUND

In March of 1975, Union Electric Company (UE) issued $70,000,000 of its First Mortgage Bonds, 10½ Series due March 1, 2005 pursuant to a Supplemental Indenture. The bonds had a par value of $1,000, and were sold to a group, or syndicate, of eighty-eight underwriters, who offered the bonds to the public. By April 9, 1975, all of the bonds had been sold to the public, and the syndicate was dissolved. Harris purchased twelve bonds at 100% of par, or a total price of $12,000. Continental purchased 1,000 bonds in two transactions — 500 bonds at 98.25% of par, or $491,000, and 500 bonds at 102% of par, or $510,000. National purchased 3000 bonds in three transactions — 1,000 bonds at 100.55% of par, or $1,005,000, 1,500 bonds at 100.5625%, or $1,508,437.50, and 500 bonds at 100.25%, or $501,250.

On April 11, 1978, UE publicly announced its plan to call $50,000,000 of the Series 2005 Bonds. As a result of the announcement, the market value of the bonds plunged from approximately 112 to 101, or $120 per bond. To implement the plan, UE incurred short-term debt of $49,887,000 in cash at an

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[1] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

interest rate of less than 10.60%, which it deposited with its mortgage trustee; $49,187,000 was placed in UE's Maintenance Fund and $700,000 was placed in its Improvement Fund. The short-term debt was to be replaced by a private placement of a long-term mortgage bond issue at 9.35%. Although UE instructed the trustee to call the Series 2005 Bonds, the trustee refused to do so without judicial approval because it questioned the legality of the plan to call the bonds through the Maintenance Fund. On May 9, 1978, the plaintiffs in this suit instituted a state court action in the Missouri State Circuit Court against UE and its trustee, seeking injunctive and declaratory relief. The purchasers of the 9.35% bonds (the bonds that were to be sold to replace the short-term debt) refused to buy when they learned of the state court action. Consequently, on June 19, 1978, UE abandoned its plan, and withdrew the cash from the Maintenance Fund. In December of 1979, the Missouri Circuit Court granted the plaintiffs' motion for summary judgment. The Missouri Court of Appeals reversed, construing the indentures and the bond contract to allow UE to call the Series 2005 Bonds as it had planned. *Harris v. Union Electric Co.*, 622 S.W.2d 239, 246-50 (Mo. Ct. App. 1981). The court of appeals did not rule on the issue of whether the prospectus for the Series 2005 Bonds adequately disclosed the bonds' call protection because it held that issue was not properly before the court. *Id.* at 244. The prospectus, however, as well as the plan, is the subject of the present action, which the plaintiffs instituted in the federal district court on February 11, 1980.

The plaintiffs' amended complaint alleged violations of section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j (b) (1982), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5 (1985). Specifically, the plaintiffs claimed that the prospectus for the Series 2005 Bonds misrepresented and omitted material facts regarding the call-protection provisions of the bond contract, and that the attempted plan to call the bonds constituted a scheme to defraud the bondholders

because UE knew the plan was "contrary to and prohibited by the terms of the prospectus." The district court certified the class pursuant to Fed. R. Civ. P. 23(b) (3). The court's amended definition of the class included "[a]ll persons, companies, and corporations who held First Mortgage Bonds of Union Electric Company, 10½% Series, due March 1, 2005, as of the public redemption announcement by Union Electric Company on April 11, 1978." The class consisted of 1,500 bondholders, holding a total of 67,906 bonds. After a bifurcated trial on the issues of liability and damages, the jury returned verdicts in favor of the plaintiffs, awarding them $2,716,240. The court entered its judgment in accordance with the verdicts, and UE appealed.

II. DISCUSSION

A. Statute of Limitations

UE contends that the plaintiffs' claims are barred by the two-year statute of limitations set forth in section 409.411(e) of the Missouri Revised Statutes. UE argues that the claims are untimely because this action was commenced five years after the bonds were sold, and three years after several plaintiffs learned of a "similar plan" implemented by Florida Power & Light Company (FP & L). Although UE correctly identifies the appropriate statute of limitations, its argument must fail. In *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139, 146 (8th Cir. 1979), the court held that section 409.411(e) is the appropriate statute of limitations for section 10(b) and Rule 10b-5 actions commenced in Missouri federal courts. It is well established, however, that the limitations period is tolled until the fraud is discovered or, upon reasonable inquiry, when it should have been discovered. *Id.* at 140 n.7 (citing *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970)). *See also Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1343 (8th Cir. 1980). Although the bonds were sold in 1975, the plaintiffs did not discover the fraud until UE announced its plan

to call the bonds on April 11, 1978. Furthermore, in these circumstances, a reasonable person holding UE's Series 2005 Bonds would not have discovered the fraud simply by learning in 1977 that FP & L announced a plan to redeem similarly issued bonds. Indeed, several experts, including several UE officials, were not aware of the possibility of UE employing such a plan with respect to the Series 2005 Bonds until long after FP & L implemented its plan. Therefore, we hold that the plaintiffs' action is not barred by the statute of limitations.[2]

B. Rule 10b-5

The plaintiffs' amended complaint alleged that UE's conduct violated section 10(b) and Rule 10b-5 in two respects, which they describe as disclosure fraud and transaction fraud. First, UE committed disclosure fraud when it misrepresented and omitted material facts in its prospectus concerning redemption and refunding rights. Second, UE engaged in a course of business and employed a device, scheme, or artifice to defraud, constituting the transaction fraud, when it borrowed funds at an interest rate lower than 10.60%, deposited the funds in the Maintenance Fund, instructed the trustee to call the Series 2005 Bonds, and publicly announced its plan to call the bonds, causing the market price of the bonds to plummet.

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[2] UE also contends that the court's amended definition of the class erroneously operated retroactively to include parties and claims otherwise barred by the two-year statute of limitations. The disctrict court has "broad discretion in determining whether a class action may be maintained, and its determination will not be overturned absent a showing that it abused that discretion." *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551 (1974), the Court stated that "the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as the named plaintiffs." We hold that the claims of those members who were subsequently added to the class as a result of the court's redefinition are not barred by the statute of limitations because the named plaintiffs commenced the action within the applicable time period.

UE contends that the evidence was insufficient to support a jury verdict for damages pursuant to Rule 10b-5 because no probative evidence was submitted to establish materiality, reliance, damages, or scienter with respect to the class in general, and specifically, with respect to those members who held bonds on April 11, 1978 (the date the plan was announced), but who did not purchase their bonds in 1975.[3] UE argues that the plaintiffs' proof that UE officials were unaware of the possibility of calling the bonds until 1977, after FP & L implemented its plan, negates any allegation of scienter at the time the bonds were issued in 1975. UE claims that it could not have made a conscious effort to mislead investors in 1975 about the possibility of a plan that it was unaware existed until 1977. UE also argues that the plaintiffs failed to establish materiality. Although evidence was submitted showing that call-protection provisions in general are material, UE contends that the plaintiffs failed to show that an otherwise worded provision in the prospectus would have caused an average buyer to make a different investment decision. In fact, it is UE's position that the prospectus clearly disclosed UE's right to call the bonds in the manner in which the plan provided. It is also UE's position that those members of the class who held bonds on the date the plan was announced, but who did not purchase their bonds in 1975, could not have relied on the misrepresentations and omissions of material fact allegedly made by UE in 1975. Therefore, UE argues, those members could not prove fraudulent conduct, materiality, or reliance. UE also contends that the class members as well as the named plaintiffs were not damaged. UE argues that because the plan was cancelled before any bonds were selected for call, bondholders did not sustain a loss. The

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[3] With the few exceptions that we address in our discussion, UE's arguments under its first, second, and third brief points can be characterized as challenging the sufficiency of the plaintiffs' evidence to prove their section 10(b) and Rule 10b-5 claims.

evidence showing that the market value of the bonds dropped twelve points after the plan was announced, but before it was cancelled, does not measure a loss by the bondholders.

Our review of these issues is governed by the "sufficiency of the evidence" standard. Factual issues determined by the jury will not be reversed by this court when the verdict is supported by substantial evidence in the record. *See Mizell v. United States,* 663 F.2d 772, 776 (8th Cir. 1981); *Ozark Airlines, Inc. v. Larimer,* 352 F.2d 9, 11 (8th Cir. 1965). Although the plaintiffs argue that two separate instances of fraud exist — disclosure fraud and transaction fraud — we hold that the evidence is sufficient for the jury to have found that UE's entire conduct from March, 1975 to April, 1978 concerning the Series 2005 Bonds constituted a course of business and scheme or artifice which operated as a fraud on the bondholders.

Pursuant to section 10(b) of the 1934 Securities Exchange Act, the Securities Exchange Commission promulgated Rule 10b-5, which proscribes fraudulent conduct in connection with the purchase or sale of securities. *See St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 562 F.2d 1040, 1047 (8th Cir. 1977), *cert. denied,* 435 U.S. 925 (1978).[4]

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[4] Section 10 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange —
>
> * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1982). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the

To succeed in a private action pursuant to Rule 10b-5, a plaintiff must establish 1) that the defendant acted in a manner prohibited by the Rule, whether it be that the defendant employed a device, scheme, or artifice to defraud, made misrepresentations or omissions of material fact, or engaged in acts, practices, or courses of business that operate as a fraud or deceit; 2) causation, often analyzed in terms of materiality and reliance; 3) damages; and 4) that the fraudulent activity occurred in connection with the purchase and sale of a security. *See Austin v. Loftsgaarden,* 675 F.2d 168, 176-80 (8th Cir. 1982); 17 C.F.R. § 240.10b-5 (1985). A finding of scienter, that is, an "intent to deceive, manipulate, or defraud," is also a prerequisite to recovery under section 10(b) and Rule 10b-5. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976).

1. Prohibited Conduct

The plaintiffs contend that UE's conduct with respect to the prospectus violated Rule 10b-5(b). It is the plaintiffs' position that the redemption provisions in the prospectus provide an absolute ban on lower cost refunding before March 1, 1985. The plaintiffs argue that these provisions misrepresent or omit material facts concerning the call protection and redemption rights set forth in the bond contract. The applicable provisions of the prospectus provide:

> use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> > (a) To employ any device, scheme, or artifice to defraud,
> > (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> > (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
>
> 17 C.F.R. § 240.10b-5 (1985).

The New Bonds are redeemable, at the option of the Company, at the redemption prices set forth herein, provided that, prior to March 1, 1985, the Company may not redeem any of the New Bonds (other than through the Improvement Fund or by the application of certain moneys in the Maintenance Fund or otherwise in the trust estate) from or in anticipation of funds borrowed having an interest cost to the Company of less than 10.60% per annum. (This provision is located on the cover page of the prospectus.)

Redemption Provision ..... Non-refundable, otherwise than through the Improvement Fund or by the application of certain moneys in the Maintenance Fund or otherwise in the trust estate, at a lower interest cost prior to March 1, 1985 (page 3 of the prospectus)

Redemption. The New Bonds are to be redeemable in whole or in part upon at least 30 days' notice, at the election of the Company, at the applicable Regular Redemption Prices set forth in the following table, expressed in each case in percentages of principal amount, and at a Special Redemption Price of 100% of their principal amount, together with interest accrued to the redemption date; provided, however, that the New Bonds may not be so redeemed at the Regular Redemption Prices prior to March 1, 1985 if moneys for such redemption are obtained by the Company, directly or indirectly, from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum. Regular Redemption Prices apply to all redemptions except in the following cases to which the Special Redemption Price will apply: (a) redemptions for the Improvement Fund for the New Bonds, or (b) redemp-

tions by application of cash in the Maintenance Fund or from certain other moneys included in the trust estate. (page 28 of the prospectus)[3]

Improvement Fund. So long as any New Bonds are outstanding, the Company will, on or before April 15 in each year beginning with 1977, provide an annual Improvement Fund for the New Bonds in an amount equal to 1% of the greatest principal amount of New Bonds issued prior to January 1 of such year, less New Bonds retired by application of certain moneys included in the trust estate, which amount may either be paid in cash or satisfied (i) by delivery of New Bonds theretofore issued and outstanding, or (ii) by application thereto of 60% of the amount of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien which the Company elects so to use. Moneys paid into the Improvement Fund for the New Bonds are to be applied to the redemption of New Bonds. (March 1975 Supplementary Indenture, Art. IV.) Similar improvement funds are provided for Bonds of prior Series by the supplemental indentures under which such Bonds were issues, except that certain of such funds may be satisfied by application of 100% of the amount of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien which the Company elects so to use. (page 29 of the prospectus)

Maintenance Fund. So long as any New Bonds are outstanding, the Company is required, on or before April 15 in each year, to deposit with the Trustee an amount in cash equal to 15% of its Gross Operating Revenues for the

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[3] Following this provision, on page twenty-eight of the prospectus, is a list of the "Regular Redemption Prices" for each year from 1975 to 2004, expressed in a percentage of par. The prices begin at a premium of 110.50% in 1975, and decrease to 100%, or par, in the year 2004.

> preceding year (after certain deductions including expenditures for maintenance and repairs). Such deposit may be reduced by certain credits, including the amount of property retirements not in excess of property additions, any available balance of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien and the principal amount of Bonds retired (except out of trust estate moneys). Moneys paid into the Maintenance Fund may be added to any of the improvement funds for the New Bonds or Bonds of prior Series and applied to redemption of Bonds to which such improvement fund relates. (1941 Supplemental Indenture, Part IV, Sec. 5; March 1975 Supplemental Indenture Act, Art. IV, Sec. 5.) (page 29 of the prospectus)

The parties' arguments focus on the call-protection provision on the cover page of the prospectus. The plaintiffs interpret this provision as setting forth an absolute prohibition on lower cost refunding by UE. The plaintiffs contend that the parenthetical in that provision is an exception to the restriction on redeeming bonds before March 1, 1985. The plaintiffs argue that this exception does not apply, however, to the restriction that follows that parenthetical, the restriction on lower cost refunding. According to this interpretation, if UE wanted to call the bonds before March 1, 1985, it could not do so with funds borrowed at an interest rate of less than 10.60%, *even if* UE implemented the call through the Improvement or Maintenance Funds. UE argues, on the other hand, that the parenthetical is an exception to both the restriction on call that precedes the parenthetical, *and* the restriction that follows it. According to this interpretation, UE could not redeem the bonds before March 1, 1985 with funds borrowed at less than 10.60% *unless* UE did so through the Improvement or Maintenance Funds.

Although both the plaintiffs' and UE's interpretations of the cover-page provision are plausible, we do not limit our determination to this single provision. To the contrary, we consider

the prospectus in its entirety, as we assume the jury did, together with the intentions of the parties. When the cover-page provision is read together with the redemption provisions on pages three and twenty-eight, and with the Improvement and Maintenance Fund provisions on page twenty-nine, it is clear that the jury could have reasonably found that the prospectus is ambiguous and misleading in that it omits material facts concerning the call protection. This finding is supported by the testimony of the purchasers, underwriters, and UE officials, all expressing the mutual intent of the parties that the bonds would possess solid protection against call for ten years.

Article VIII, section 8 of the bond contract has been judicially construed by the Missouri Court of Appeals to authorize lower cost refunding at the special redemption prices. *Harris v. Union Electric Co.*, 622 S.W.2d at 251. The prospectus, however, does not mention Article VIII, section 8. The prospectus is misleading in that it does not adequately disclose the authorization set forth in section 8, while giving the impression that refunding the bonds at a lower rate of interest before March 1, 1985 is prohibited. The redemption provision on page twenty-eight of the prospectus prohibits lower cost refunding at the Regular Redemption Prices, and the bond contract allows such refunding at the Special Redemption price. This "protection" is a sham. The Regular Redemption Prices are premiums, but the Special Redemption Price is fixed at par. A restriction on lower cost refunding at a premium with no such restriction at par affords no meaningful protection against call. UE would never call the bonds at a premium if it could call them at the lower price of par. This renders the premium price list on page twenty-eight of the prospectus meaningless and misleading, since it represents prices that would never be paid. Finally, the prospectus is misleading in that it fails to disclose UE's right to directly call the bonds through the Maintenance Fund. The bond contract, however, has been judicially construed to provide UE with such a right. Yet, the Maintenance Fund provision on page twenty-nine of the prospectus indicates that funds

deposited in the Maintenance Fund may be used indirectly to redeem bonds by first transferring the money to the Improvement Fund. This distinction is important because had UE redeemed the bonds indirectly through the Maintenance Fund according to the provision on page twenty-nine, it could not have avoided paying the premium prices.[6] The jury reasonably could have found that the prospectus is misleading and ambiguous in that it omits material facts that would have adequately disclosed the call protection of the bonds.[7]

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[6] The "Special Redemption Price" of par only applies to redemptions in an amount equal to the required deposit — one percent of the outstanding issue. Therefore, had UE called the bonds according to the Maintenance Fund Provision, it would have been forced to pay a premium after the first $700,000 of the call. (See the testimony of Stewart Smith, a vice president and General Counsel of UE, Record Tr. 6-24.)

[7] Consequently, the prospectus, having been drafted by UE, should be interpreted and construed liberally in favor of the investors, and strictly against UE. *See Corso v. Creighton University*, 731 F.2d 529, 533 (8th Cir. 1984) (contract ambiguities must be construed against the drafting party); Restatement (Second) of Contracts § 206 (1981). *See generally A.W.G. Farms, Inc. v. FDIC*, 757 F.2d 720, 726 (8th Cir. 1985) ("[A] contract of insurance is to be construed liberally in favor of the insured and strictly as against the insurer."); *City of Carter Lake v. AETNA Casualty & Surety Co.*, 604 F.2d 1052, 1056 (8th Cir. 1979) (doubt or ambiguity construed strictly against insurer and liberally in favor of the insured). The rationale for this rule is that the drafter of the instrument is "more likely than the other party to have reason to know of uncertainties of meaning. Indeed, [the drafter] may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert." Restatement (Second) of Contracts § 206 comment a (1981). The evidence is inconsistent concerning this point. Although UE contends that none of its officials were aware of the possibility of calling the bonds in the manner in which it planned, Mr. Friel, a vice president and the controller at UE, testified that he was aware of such a possibility in 1975. Even if UE officials did not deliberately leave the meaning of the prospectus obscure, they were obviously aware of uncertainties, the meaning of

The testimony of several UE officials and sophisticated market analysts also supports a finding by the jury that the prospectus is misleading and omits material facts concerning the call protection. These experienced individuals believed that the prospectus prohibited UE from refunding the bonds at a lower interest rate for ten years. Mr. Welshans, UE's Vice President of Finance, testified that the thrust of the representation that UE was making in the prospectus to the members of the general public or whomever bought the bonds was that the company would not refund the bonds at a lower rate of interest for ten years. Record Tr. 3-89-90. Mr. Murray, the Corporate Secretary, and Mr. Smith, a vice president and General Counsel, both testified that UE intended to give protection against call for ten years. Mr. Fendrich, a vice president at Standard and Poor's Corporation testified that he could not understand how protection against lower cost refunding at a premium, but not at par, could be considered valid protection; he stated that this "protection" made "no sense." Finally, Mr. Calder, a vice president at Lehman Brothers, one of the underwriters for the Series 2005 Bonds and an expert in underwriting and investment banking, testified that the redemption provision on page twenty-eight of the prospectus accurately reflected his understanding that the bonds were nonrefundable at a lower interest cost for ten years. This testimony clearly indicates that these people interpreted the prospectus as prohibiting UE from refunding the Series 2005 Bonds for ten years at a lower rate of

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which were decided at a later date to suit UE's purposes. We are mindful that the rule of construction stated above "does not justify abandoning principles of normal interpretation where the [provision] is clear, or taking such a construction as would vary the true meaning of the [provision] and the intentions of the parties." *Johnson v. United Fire Insurance Co.*, 586 F.2d 1291, 1295 (8th Cir. 1978). When read together, however, the call-protection provisions are not clear, and construing them in favor of the investors is consistent with the testimony of all the parties indicating that it was their intention that the bonds would possess solid protection against call for ten years.

interest, which is contrary to UE's rights as construed in the bond contract. It is also clear from the testimony of the purchasers, as well as UE officials, that both parties intended that the bonds would possess solid call protection.

Based on the language of the prospectus, the testimony of the parties expressing their intentions, and the testimony of the market experts, we conclude that the plaintiffs produced sufficient evidence for the jury to have found that the prospectus is ambiguous and misleading in that it omitted material facts that would have adequately disclosed UE's right to call the bonds, in violation of Rule 10b-5(b). We also conclude that the evidence is sufficient for the jury to have found that these omissions were part of a larger scheme or course of business to defraud the bondholders. To knowingly implement a plan in 1978 to call bonds that were previously intended and marketed as having solid call protection until 1985, constitutes a course of business, or a device, scheme, or artifice that operates as a fraud on the bondholders in violation of Rule 10b-5(a) and (c). Therefore, UE's conduct falls within all three subparagraphs of Rule 10b-5.[8]

2. Causation

To satisfy the causation element, the plaintiffs were required to show "some causal nexus" between UE's conduct and the plaintiffs' loss. *St. Louis Union Trust Co.*, 562 F.2d at 1048.

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[8] UE argues that it cannot, as a matter of law, violate Rule 10b-5 because it was acting pursuant to a contractual right provided for in the bond contract as later construed by the Missouri Court of Appeals. In support of its position, UE cites *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 965 (1981) and *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 562 F.2d 1040 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). UE's argument is unpersuasive. Unlike the situations in *Broad* and *St. Louis Union Trust Co.*, the parties' intentions in this case were contrary to the subsequently construed contractual right in question. It is undisputed that UE marketed the bonds as possessing solid call protection for ten years.

Causation is often analyzed in terms of materiality and reliance. *Id.* When the alleged fraudulent conduct consists of misrepresentations, the plaintiff is required to show that the fact was material and that he relied upon it in making his investment decision. *Id.* When the alleged fraudulent conduct involves primarily a failure to disclose, however, the plaintiff is not required to prove reliance. Instead, reliance is inferred from materiality; that is, the causation element is established if the facts that were withheld are material. *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 153-54 (1972). (In a case "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.") Several courts also distinguish between "transaction causation" and "loss causation," and require the plaintiff to establish both. *See Wilson v. Comtech Telecommunications Corp.,* 648 F.2d 88, 92 n.7 (2d Cir. 1981); *Huddleston v. Herman & MacLean,* 640 F.2d 534, 549 and n.24 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 459 U.S. 375 (1983); *Schlick v. Penn-Dixie Cement Corp.,* 507 F.2d 374, 380 (2d Cir. 1974), *cert. denied,* 421 U.S. 976 (1975). Transaction causation is established when the plaintiff shows that the defendant's fraudulent conduct caused the plaintiff to engage in the transaction in question. *See Wilson,* 648 F.2d at 92 n.7; *Schlick,* 507 F.2d at 380. This is nothing more than "but for" causation, which is merely another way of describing reliance. Loss causation, on the other hand, is the nexus between the defendant's fraudulent conduct and the plaintiff's pecuniary loss. *Wilson,* 648 F.2d at 92 n.7; *Huddleston,* 640 F.2d at 549 n.24. We hold that despite which terms are used, the evidence is sufficient to sustain a finding by the jury that the causation element was established.

A fact is "material if it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *Austin v. Loftsgaarden,* 675 F.2d at 176 (citing *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438,

449 (1976)). Although UE concedes that call provisions in general are material, it argues that the plaintiffs failed to establish that a differently worded redemption provision in the prospectus would have caused the average bond purchaser to make a different investment decision. We disagree. The jury heard the testimony of various purchasers, as well as market experts who stated that had the prospectus accurately disclosed UE's right to call the bonds before March 1, 1985, UE would have been forced to offer the bonds at a lower price or at a higher yield. The jury is competent to make a materiality finding, *see id.* at 177, and we find no error in its determination in this case. Reliance is established when the plaintiff shows that he was induced to act differently than he otherwise would have in making his investment decision. *St. Louis Union Trust Co.*, 562 F.2d at 1048. Because the plaintiffs' complaint consists primarily of allegations of a failure to adequately disclose the call-protection rights, reliance in this case can be inferred from materiality. Therefore, whether this element is discussed in terms of reliance or transaction causation, it was established at trial.[9] In addition to reliance, or transaction causation, the plaintiffs were also required to prove loss causation. This issue obviously overlaps with the issue of damages, and we will address it accordingly.

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[9] UE also contends that the evidence is insufficient to establish reliance by those bondholders who held bonds on April 11, 1978, but who did not purchase them in 1975. UE argues that these bondholders did not rely on the alleged omissions of material fact by UE in 1975. We disagree. False or misleading information, such as that involved in this case, can actually harm investors directly — through actual reliance, or indirectly — by affecting the market upon which the investor relied and traded. *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 69 (8th Cir. 1980) (court held that the plaintiffs were not damaged as a result of the defendants' conduct because they neither relied nor traded), *cert. denied,* 449 U.S. 1079 (1981). The plaintiffs established that UE's misleading prospectus inflated the price of the bonds on the open market, which these later purchasers relied upon in making their investment decision. *See Lipton v. Documation, Inc.*, 734 F.2d 740, 748 (11th Cir. 1984) (adopting a fraud on the market theory of recovery), *cert. denied,* 105 S.Ct. 814 (1985).

3. Damages

In securities fraud cases, damages are determined in accordance with the extent to which a plaintiff is actually damaged as a result of the defendant's fraudulent conduct. *Austin,* 675 F.2d at 180. Actual damages are generally measured by determining the plaintiff's out-of-pocket loss, which is in turn measured by the difference between the purchase price of the security and its actual value. *Id.* (citing *Harris v. American Investment Co.,* 523 F.2d 220, 225 (8th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976)). In *Harris v. American Investment Co.,* the court recognized that the actual value of the security may be determined either on the date of purchase or on the date the fraud was discovered. 523 F.2d at 225-27. The court acknowledged that in some cases, especially when the security is traded publicly, it may be difficult to ascertain the value of the security transferred in connection with the fraudulent conduct and in such cases the value may be determined on the date the fraud is discovered. *Id.* at 226. In any event, "the function of the court 'is to fashion the remedy best suited to the harm.' " *Austin,* 675 F.2d at 181 (quoting *Garnatz v. Stifel, Nicolaus & Co.,* 559 F.2d 1357, 1360 (8th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978)). UE argues that the proper measure of damages is the difference between the purchase price of the bonds and the value of the bonds once the alleged fraud was discovered, which was on the day the plan to call the bonds was announced. UE contends that the evidence is insufficient to establish damages. Although the price of the bonds dropped twelve points from approximately 113 to 101, or $120 per bond, on the day the plan was announced, UE argues that because the named plaintiffs purchased the bonds for less than 101, they did not incur a loss as a result of UE's conduct. We disagree.

The proper measure of damages in this case is the difference between the purchase price and the actual value of the bonds on the date they were issued. This remedy is best suited to the harm in this case because it represents the reduction in the value of the bonds caused by the lack of call protection. Although the plain-

tiffs purchased the bonds for less than 101, the bonds were worth much less because the call protection that the plaintiffs thought they were purchasing did not exist. The plaintiffs paid more for the bonds than they were actually worth. This is not one of those cases recognized by the court in *Harris v. American Investment Co.* in which the value of the security should be determined on the date the fraud was discovered because its true value on the date it was purchased is too difficult to ascertain. To the contrary, we believe that the true value of the bonds on the date they were issued is reflected by the *drop* in the market price once the fraud was discovered. We agree with the plaintiffs that the reduction in market value fairly represents the reduction in the initial purchase price of the bonds that would have been necessary in order to sell them at 10½% without the call protection. The plaintiffs introduced ample evidence demonstrating that if UE had issued the bonds without the ten-year-call protection, the plaintiffs would have either paid a substantially lower price for the bonds or demanded a higher coupon rate. The evidence indicated that "at least two major underwriters," Merrill Lynch and Halsey Stuart, advised UE that it would cost the company several basis points if the bonds were issued without the call protection. This evidence was supported by the testimony of UE officials and market analysts that the bonds could not have been sold for par and at 10½% without the ten-year-call protection. (See, for example, the testimony of Mr. Welshans, Record Tr. 3-63-73.) We conclude, therefore, that the jury could reasonably find on the basis of these facts that UE's conduct in announcing its plan to call the bonds, which rendered the representations in the prospectus misleading, caused the plaintiffs' damages. Further, we hold that the damages are best measured by the difference between the purchase price of the bonds and their true value on the date purchased.[10]

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[10] UE also urges that because the plan was cancelled, the plaintiffs were not damaged, and therefore they lacked standing to sue. We

4. In connection with.

Section 10(b) and Rule 10b-5 proscribe fraudulent conduct "in connection with the purchase or sale of any security." 15 U.S.C. § 78j (1982); 17 C.F.R. § 240.10b-5 (1985). Plaintiffs must show that the fraudulent conduct "touches" the purchase or sale of the securities. *See Superintendent of Insurance v. Bankers Life & Casualty Col,* 404 U.S. 6, 12-13 (1971). It is undisputed in this case that the named plaintiffs purchased their bonds in connection with UE's fraudulent conduct. UE argues, however, that the other members of the class who held bonds on April 11, 1978 did not purchase their bonds in connection with the alleged omissions of material fact in the prospectus. Although the *Bankers Life* Court did not explain what constitutes "touching" a security transaction, we believe that UE's fraudulent conduct "touches" the class members' purchases of their bonds. The market price of the bonds reflected the misleading call protection. If the call protection had been accurately disclosed before these members of the class purchased their bonds, they would have paid less for the bonds or demanded a higher yield. Clearly, these members of the class purchased their bonds in connection with UE's fraudulent conduct.[11]

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disagree. As a result of UE's fraudulent scheme or course of business, the plaintiffs paid for call protection that they in fact did not receive. Consequently, the plaintiffs were injured, and have standing to sue.

[11] UE also argues that, with the exception of the named plaintiffs, the evidence did not establish that each member of the class was a purchaser of the bonds. The Supreme Court has ruled that only purchasers or sellers of securities may maintain a private cause of action for money damages pursuant to Rule 10b-5. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975). The Court stated that the virtue of its ruling "is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates." *Id.* at 747. *See Vervaecke v. Chiles, Heider & Co.,* 578 F.2d 713, 719 (8th Cir. 1978). We believe that the members of the class who held the bonds on April 11, 1978 dealt in the security to which the omissions concerning the call protection relate.

Finally, the plaintiffs were required to prove scienter, that is, that UE engaged in the fraudulent conduct with an intent to deceive, manipulate, or defraud the bondholders. *See Hochfelder,* 425 U.S. at 193. UE argues that the plaintiffs failed to establish scienter at the time the prospectus was issued in 1975. Several UE officials testified that in 1975 they were unaware of the possibility of refunding the bonds in any fashion before March 1, 1985. UE argues that because the alleged omissions of material fact in the prospectus were not made with scienter, the plaintiffs cannot recover. We disagree. We have stated that the evidence is sufficient for the jury to have found that UE's activities between March of 1975 and June of 1978 constituted a scheme or course of business that operated as a fraud upon the bondholders. Although UE officials had no intent to defraud when they represented that the bonds possessed ten-year-call protection, they certainly intended to defraud the bondholders of this protection when they announced the plan to call the bonds before the ten-year period had run. There is substantial evidence demonstrating that UE knew that the plan was contrary to its representation in the prospectus concerning the call protection. Several UE officials testified that the company, without a doubt, initially intended to provide "solid protection" against call for ten years. The evidence indicated that Mr. Grainger, one of UE's Advisory Directors, vehemently opposed the plan as "subordinating moral responsibility for financial gain," and cautioned UE's president that the "contract with the Bondholders should be kept inviolate." UE's Vice President of Finance, Mr. Welshans, testified that the company was well aware that the plan was contrary to the protection that the underwriters, the bondholders, and Union Electric all mutually intended the bonds to possess. The evidence also indicated that UE only hesitated long enough to assure itself that it could re-enter the bond market at a later date without any trouble. Once UE observed that FP & L's plan did not adversely affect its ability to re-enter the market, UE implemented its plan. UE's conduct in this case certainly is inconsistent with the

fundamental purpose of the Securities Exchange Act, which is " 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.' " *Affiliated Ute Citizens,* 406 U.S. at 151 (quoting *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 186 (1963)). We believe that the plan to call the bonds in these circumstances is within the range of ingenious devices used to manipulate securities that Congress intended to prohibit. Clearly, the evidence is sufficient from which the jury could have found that UE acted with the intent to defraud the bondholders.[12]

UE relies heavily on *Lucas v. Florida Power & Light Co.,* 765 F.2d 1039 (11th Cir. 1985) in support of its position that it did not violate section 10(b) and Rule 10b-5. In *Lucas,* the plain-

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[12] The district court instructed the jury that reckless behavior would constitute scienter. Instruction No. 18A. Although the Supreme Court has explicitly left open the question whether reckless behavior satisfies the scienter requirement, *Hochfelder,* 425 U.S. at 193-94 n. 12, this instruction reflects the prevailing view of the courts of appeals. *See, e.g., Woods v. Barnett Bank,* 765 F.2d 1004, 1010 (11th Cir. 1985); *Teamsters Local 282 Pension Trust Fund v. Angelos,* 762 F.2d 522, 528 (7th Cir. 1985); *Burgess v. Premier Corp.,* 727 F.2d 826, 832 (9th Cir. 1984); *Broad v. Rockwell International Corp.,* 642 F.2d 929, 961 (5th Cir.) (en banc), *cert. denied,* 454 U.S. 965 (1981). In *Stokes v. Lokken,* 644 F.2d 779 (8th Cir. 1981), the court addressed this issue in the context of aiding and abetting violations of section 10(b) and Rule 10b-5. The court, without defining a comprehensive standard, held that the defendant's "conduct [fell] short of any reasonable formulation of the requisite legal standard" for recklessness. *Id.* at 783. Although we do not address the issue of recklessness since we hold that sufficient evidence exists from which the jury could have found that UE intentionally defrauded the bondholders of the call protection, we believe that the converse of *Stokes* is true in this case. Here, UE's conduct surpasses any reasonable formulation of the requisite legal standard for recklessness. It was UE's intent that the bonds would possess solid protection against call for ten years. To represent and market the bonds as possessing such protection, and then implement a plan to call the bonds within the ten-year period, constitutes at the very least recklessness on UE's part.

tiffs, FP & L bondholders, instituted a class action suit against FP & L, alleging securities fraud as a result of FP & L's *redemption* "of approximately half of the outstanding 10 1/8 bonds at the special redemption price," within five years after the bonds were purchased. *Id.* at 1041. The plaintiffs claimed that the prospectus indicated that the bonds were nonredeemable for five years. The Eleventh Circuit affirmed the district court's determination that the prospectus did not misrepresent or omit material facts concerning the redeemability of the bonds. *Id.* at 1045. *Lucas,* unlike the instant case, involved a redemption — not a refund — of the bonds. *Id.* at 1041 n. 7. Further, FP & L's prospectus clearly indicated that the five-year-call protection applied to *lower cost refunding,* but *not* to *redemptions. Id.* at 1041. Moreover, UE officials, unlike FP & L officials, *intended* and *represented* that the bonds would possess solid protection against call of any kind for the limited time period. UE's reliance on *Lucas* is misplaced.

During oral argument, UE urged the court to consider the holding in *Feldbaum v. Avon Products, Inc.,* 741 F.2d 234 (8th Cir. 1984). There, the plaintiff claimed that a "lock-up option," granted in connection with a tender offer, was a manipulative practice or device in violation of section 10(b), Rule 10b-5, and the Williams Act, which added several sections to the Securities Exchange Act, including section 14(e). *Id.* at 237. The court recognized that the plaintiff did "not allege that material information about the option was withheld or distorted." *Id.* The court affirmed the district court's dismissal of the complaint for failure to state a claim for relief because the option was not a manipulative practice or device. The court held that, in light of the full-disclosure purpose of the Williams Act, some element of deception or misrepresentation is essential to a valid section 14(e) claim. *Id.* The court noted that its discussion of 14(e) applied to an allegation of a violation of 10(b) and 10b-5. *Id.* at n. 8. UE apparently finds support in the *Feldbaum* court's discussion and holding for its proposition that the transaction-fraud theory of recovery asserted by the

plaintiffs is no longer viable. UE argues that therefore the plaintiffs cannot, as a matter of law, recover on that theory.

UE's argument is unpersuasive for two reasons. First, UE's reasoning is accurate only to the extent that any theory of recovery pursuant to section 10(b) and Rule 10b-5, whatever terminology is used to describe it, is not viable *unless* the plaintiff alleges and proves "intentional or willful conduct designed to deceive or defraud investors." *Hochfelder,* 425 U.S. at 199 (describing the term "manipulative" in the context of 10(b) liability). This is the type of conduct that the *Feldbaum* court was referring to when it held that an allegation of deception or misrepresentation is an essential requirement. The plaintiffs in this case clearly made such an allegation in their "First Amended Complaint" at paragraph twenty-one, and in their "Amendment to First Amended Complaint" at paragraph thirty-one. Further, the plaintiffs' proof at trial was consistent with these allegations. Second, and more importantly, we decline to distinguish between disclosure fraud and transaction fraud in this case when describing UE's conduct. As we stated above, we view UE's entire conduct from March, 1975 to April, 1978 as a course of business and a scheme or artifice to defraud the investors, which includes the misleading call-protection provisions in the prospectus.

In sum, we hold that the verdicts are supported by substantial evidence in the record. The plaintiffs introduced sufficient evidence from which the jury could have found that the parties mutually intended that the bonds would possess solid protection against call for ten years, that this protection was material and affected the price of the bonds, and that it was relied upon by the plaintiffs. The evidence also supported a finding by the jury the UE intended to defraud the investors of this protection when it announced its plan to call the bonds in 1978, causing the market value of the bonds to drop. Finally, the evidence showed that as a result of UE's fraudulent conduct between March, 1975 and April, 1978, the value of the bonds purchased by the

plaintiffs was less than the price they paid, which was reflected by the market drop once the investors discovered the fraud. Consequently, UE's conduct violated all three sub-paragraphs of Rule 10b-5. Therefore, we will not disturb the jury's verdicts on the plaintiffs' section 10(b) and Rule 10b-5 claims.

C. Instructions

UE contends that the court erroneously instructed the jury with respect to both liability and damages. The instructions reflect the bifurcated nature of the trial. In the liability portion of the trial, the jury was instructed not to be concerned with ascertaining a specific dollar amount of damages. Instead, the court instructed the jury "to determine in a general sense, whether or not the plaintiffs have sustained some damage."

UE argues that the instructions failed to require a finding by the jury that the plaintiffs suffered a causally related loss. UE's argument is without merit. When a portion of the jury instructions are challenged, we must look to the instructions as a whole. *Simpson v. Norwesco, Inc.*, 583 F.2d 1007, 1013 (8th Cir. 1978). The instructions clearly informed the jury that to find liability, it must determine that the plaintiffs suffered a loss. The specific dollar amount was determined in the damage portion of the trial. The court did not erroneously instruct the jury.

With respect to damages, UE argues that the court erroneously instructed the jury on the proper measure of damages. We thoroughly addressed this issue in our discussion above, and concluded that the damage measurement was proper. UE also argues that the jury should have been instructed to reduce the amount of damages by the value of any benefits received by the bondholders as a result of their investment. This argument is also without merit. In support of its position, UE relies on *Austin*, 675 F.2d at 181. In *Austin*, the court held that when rescissional or restitutional damages are awarded instead of the

traditional out-of-pocket damages, the award should be reduced by any value received as a result of the fraudulent transaction. *Id.* The *Austin* court specifically limited its holding, however, "to cases involving investments that are expressly marketed and sold as tax shelters." *Id.* at 183; *see Austin v. Loftsgaarden,* 768 F.2d 949, 953 n. 5 (8th Cir.) (en banc), *cert. granted, sub nom., Randall v. Loftsgaarden,* 106 S. Ct. 379 (1985). In this case, the plaintiffs were not awarded rescissional or restitutional damages, and the bonds were not marketed and sold as tax shelters. Consequently, we hold that the court properly refused to instruct the jury to reduce the award by the value of any benefits received by the plaintiffs.

D. Exclusion of Evidence

Finally, UE contends that the court erred in excluding all evidence concerning the market value of the bonds after the plan was cancelled. Specifically, UE argues that the court should have allowed its witness to testify that the market value of the bonds merely dropped as a result of UE's announcement of the plan, and that when the plan was cancelled, the bonds recovered. UE argues that because the bonds recovered, the plaintiffs did not suffer a loss. UE also argues that the court erroneously excluded evidence of the plaintiffs' continued receipt of interest payments.

The district court has broad discretion concerning the admissibility of evidence, and we will disturb the court's ruling only upon a clear showing of an abuse of that discretion. *Smith v. Firestone Tire & Rubber Co.,* 755 F.2d 129, 134 (8th Cir. 1985). By continuing to hold the securities after the discovery of the fraud, the investor "has, in effect, made a second investment decision unrelated to his initial decision to purchase the [securities]." *Harris v. American Investment Co.,* 523 F.2d at 228. The *Harris* court noted that whatever happens after this second investment decision has no bearing on the measure of the investor's damages. *Id.* Although the court was responding to

the argument that the investor should have mitigated his damages by selling his stock after discovering the fraud, we believe that the same principle applies in this case. *See Nye v. Blyth Eastman Dillon & Co.*, 588 F.2d 1189, 1198 (8th Cir. 1978). The bondholders made a second investment decision when they decided to hold the bonds after the plan was announced and the market value of the bonds had plunged. The recovery of the bonds two months later, and the continued receipt of interest payments have no bearing on the measure of the plaintiffs' damages caused by UE's fraudulent conduct. Therefore, we hold that the district court did not abuse its discretion in excluding the proffered evidence.

III. Conclusion

In conclusion, we hold that the plaintiffs' cause of action was not barred by the statute of limitations, the evidence is sufficient to sustain the jury's verdicts on the section 10(b) and Rule 10b-5 claims, and the court did not err in instructing the jury or in excluding UE's proffered evidence. Therefore, we affirm the judgment of the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment of the United States Court of Appeals for the Eighth Circuit, filed March 24, 1986

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1252-EM

Harold Harris, et al.,
Appellees,

vs.

Union Electric Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

March 24, 1986

APPENDIX C

Judgment of the United States District Court for the Eastern District of Missouri, filed November 14, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-0196C(3)

Harold Harris, Contintental Casualty Co., and National Fire Insurance Co. of Hartford, individually and as representatives of all of the holders of the $70,000,000 First Mortgage Bonds of Union Electric Co., 10½%, Series due March 1, 2005 as of April 11, 1978,

Plaintiffs,

vs.

Union Electric Company,

Defendant.

JUDGMENT

This action, having been bifurcated, came on for trial before the Court and a jury, Honorable William L. Hungate, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict, and liability having been found by the jury in favor of plaintiffs and against defendant on October 18, 1984;

Damages hearing having been held on November 8, 9, 13. and 14, 1984, and verdict having been rendered,

IT IS ORDERED AND ADJUDGED that, in accordance with the jury's verdict, the plaintiffs recover of the defendant

on plaintiffs' Rule 10(b)-5 claims in Count II of the amended complaint damages in the sum of TWO MILLION SEVEN HUNDRED SIXTEEN THOUSAND TWO HUNDRED FORTY DOLLARS ($2,716,240.00), with interest thereon at the rate of 10.33% per annum and costs.

EYVON MENDENHALL, CLERK

By /s/ Florence H. Bertel,
Deputy Clerk

Dated at St. Louis, Missouri,
this 14th day of November, 1984.

APPENDIX D

Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1252-EM

Harold Harris, etc., et al.,
Appellees,

vs.

Union Electric Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

May 2, 1986

APPENDIX E

Order of the United States District Court for the Eastern District of Missouri, Staying Issues Except Claim Based on Rule 10b-5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-0196C(4)

Harold Harris, et al.,
Plaintiffs,

vs.

Union Electric Company, et al.,
Defendants.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that this Court's order staying proceedings in this case be and the same is continued as to all issues, except plaintiffs' claim based on Rule 10b-5 in Count II of the amended complaint, until such time as there has been an adjudication of the corresponding action in the Circuit Court of St. Louis County, Missouri, *Harris v. Union Electric Co.*, cause no. 408427.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to lift and set aside this Court's order staying proceedings be and the same is denied except as to the Rule 10b-5 claim.

Dated this 13th day of April, 1982.

/s/ William L. Hungate
United States District Judge

APPENDIX F

Order of the United States District Court for the Eastern District of Missouri, Amending Class Definition for Trial

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-0196C(3)

Harold Harris, et al.,
Plaintiffs,

vs.

Union Electric Company, et al.,
Defendants.

ORDER

This matter is before the Court on various pretrial matters.

Pursuant to 28 U.S.C. § 636(b), this cause was referred to United States Magistrate David D. Noce for all pretrial matters.

After full consideration of all matters raised, and the Order and Recommendation of the United States Magistrate, together with the objections and responses of all parties,

IT IS HEREBY ORDERED that the Order and Recommendation of the United States Magistrate, filed April 22, 1983, be and the same is sustained, adopted, and incorporated herein, as modified, in accordance with this order and the memorandum of the Court dated this day and incorporated into and made a part of this order.

Accordingly,

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to redefine the Count II class be and the same is granted and that the said class be redefined as follows:

> All persons, companies, and corporations who held FIRST MORTGAGE BONDS OF UNION ELECTRIC COMPANY, 10½% Series, due March 1, 2005, as of the public-redemption announcement by Union Electric Company on April 11, 1978.

IT IS HEREBY FURTHER ORDERED that the trial of this action be bifurcated into two parts: (1) a determination of liability and (2) if liability is established, a determination of class damages.

IT IS HEREBY FURTHER ORDERED that plaintiffs issue the class action notice attached as an exhibit to this order and memorandum. On or before June 6, 1983, the complete text of notice and the request for exclusion from the class attached hereto shall be sent to each member of the class by plaintiffs, via first-class mail, postage prepaid, at plaintiffs' cost. On or before the same date, plaintiffs shall file with the Clerk of the Court a certificate of service, setting forth the names and addresses of all members of the class to whom notice was sent. On or before June 6, 1983, the complete text of the notice and the request for exclusion from the class shall be published, at plaintiffs' cost, in the following newspapers: The Wall Street Journal, the St. Louis Post-Dispatch, the St. Louis Globe-Democrat, The Daily Record, and the St. Louis Countian.

IT IS HEREBY FURTHER ORDERED that defendants' request that the Court schedule an evidentiary hearing concerning class action issues be and the same is denied.

IT IS HEREBY FURTHER ORDERED that defendants' motion and request for extension of the discovery deadline of June 15, 1983, in order to conduct additional discovery regarding class issues, be and the same is denied.

IT IS HEREBY FURTHER ORDERED that the request of defendant Union Electric Company that its proposed form of class notice, as reported to the Court on February 28, 1983, be adopted for issuance in this case be and the same is denied.

IT IS HEREBY FURTHER ORDERED that the defendant Underwriters' motion for certification to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b) be and the same is denied.

Dated this 31st day of May, 1983.

/s/ William L. Hungate
United States District Judge

APPENDIX G

Opinion of the Missouri Court of Appeals, Eastern District

MISSOURI COURT OF APPEALS,
EASTERN DISTRICT,
DIVISION TWO.

June 16, 1981.

Harold Harris, Continental Casualty Company and National Fire Insurance Company of Hartsford, etc.,
Plaintiffs-Respondents,

v.

Union Electric Company,
Defendant-Appellant,

St. Louis Union Trust, et al.,
Defendant-Cross-Appellant.

Motion for Rehearing and/or Transfer to Supreme Court Denied Sept. 21, 1981.

Application to Transfer Denied

Nov. 10, 1981.

Francis X. Duda, St. Louis, for defendant-appellant.

Thomas S. McPheeters, Jr., David S. Slavkin, St. Louis, for defendant-cross-appellant.

David L. Campbell, St. Louis, for plaintiffs.

GUNN, Judge.

Defendant Union Electric (UE) appeals, and defendant St. Louis Union Trust cross-appeals, from a trial court order[1] granting plaintiff's summary judgment motion for declaratory and

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[1] Under Rule 81.06, Mo.R.Civ.P., the trial court designated the order final and appealable.

injunctive relief. Plaintiffs, suing individually and on behalf of all holders of Union Electric's First Mortgage Bonds, 10½ Series due March 1,2005 (Series 2005 Bonds) sought a declaration of the redemption features of their bonds. We are compelled to reverse and remand for further proceedings consistent with this opinion.

At the outset, we comment that the trial court was faced with an enormously complex and massive case. The transcript on appeal alone contains 38 volumes. And we are required to treat a multitude of issues.

On March 26, 1975, UE issued $70,000,000 of Series 2005 Bonds under a Supplemental Indenture between it as grantor and St. Louis Union Trust Company, its mortgage trustee. The 1975 Indenture incorporated and referred to various portions of an Indenture of Mortgage and Deed of Trust dated June 15, 1937 (the Original Indenture) as well as other indentures from 1937 to 1975 that also supplemented the Original Indenture.

The present controversy began in April 1978 when UE publicly announced that it intended to redeem about $50,000,000 of Series 2005 Bonds at the "special redemption" price of 100% of the par value of the bonds. To implement this redemption plan, UE had made short-term borrowings of cash at an interest rate of less than 10.6% and deposited with the trustee $700,000 for the Improvement Fund for Series 2005 Bonds and $49,187,000 for a Maintenance Fund that applied to all bonds outstanding under the Original Indenture. UE's plan was to replace these short-term borrowings with a long-term bond issue at 9.35%.

Plaintiffs objected to the redemption plan contending that the 1975 Indenture expressly precluded a redemption from funds obtained at an interest cost less than 10.6% for the first ten years, until March 1, 1985. This lawsuit was filed on May 9, 1978. Within a month UE announced that it had abandoned its redemption scheme for the time being, had withdrawn the cash from the Maintenance Fund and replaced it with property additions.

The plaintiffs' amended petition is in eleven counts; the first four counts name UE as the sole defendant and seek declaratory and injunctive relief, while the remaining seven counts also name certain underwriters as defendants and seek an award of monetary damages. Counts I, II and IV[2] are the only counts presently before this Court, having been consolidated and severed for separate trial by the trial court. Counts I and II seek declaratory and injunctive relief, alleging that if UE's redemption plan is permitted under the indentures, UE has violated the Trust Indenture Act of 1939, § 323(a) (15 U.S.C. § 77www) (Count I), and the Securities Act of 1933, § 17(a) (15 U.S.C. § 77q) (Count II), by not adequately disclosing the redemption rights in the prospectus. Count IV is headed "Declaratory Judgment" (presumably an action under the Missouri statutes dealing with declaratory judgments, §§ 527.010-.130, RSMo 1978). It basically reiterates the allegations of the first three counts and again seeks a declaration of plaintiffs' rights under the indentures and an injunction prohibiting the redemption plan contemplated by UE.

The bond mortgage and trust indentures are contained in a document several hundred pages in length. We set forth only those sections vitally important to resolution of the redemption dispute. Section 1, Article III, of the 1975 Supplemental Indenture is entitled "Redemptions" and states:

> The Bonds of 2005 Series shall, subject to the provisions of Article V of the Original Indenture, be redeemable (*otherwise than by operation of the Improvement Fund or the Maintenance Fund provided in Article IV hereof or pursuant to Section 8 of Article VIII of the Original Indenture),* at any time or from time to time prior to maturity, at the option of the Board of Directors of the Company,

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[2] Count III, alleging violations of Rule 10b-5, 17 C.F.R. § 240, 10b-5 (1980), was dismissed by plaintiffs apparently in recognition of the federal courts' exclusive jurisdiction over such claims.

either as a whole or in part by lot, at the ten applicable *regular redemption price* set forth in the form of Bonds of 2005 Series in Section 3 of Article I of this Supplemental Indenture, together in each case, with accrued interest to the redemption date.

In case of the redemption of less than all the outstanding bonds of 2005 Series, the particular Bonds or portions (equal to $1000 or a multiple thereof) of Bonds of a denomination larger than $1000 to be redeemed shall be determined by lot in such manner as the Trustee in its discretion shall deem proper, as in the Original Indenture provided.

Irrespective of the provisions of this Section 1, Bonds of 2005 Series shall not be redeemable at the option of the Company at any time prior to March 1, 1985 (*other than by the operation of the Improvement Fund or the Maintenance Fund provided in Article IV of this Supplemental Indenture or pursuant to Section 8 of Article VIII of the Original Indenture)* if moneys for such redemption are obtained by the Company directly or indirectly from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum. [emphasis added].

The third paragraph above provides the intitial controversy. It limits redemption for the first ten years if the funds for redemption come from borrowings at less than 10.6%. Plaintiffs maintain that this restriction on lower interest cost refunding also applies to redemptions "by the operation of the Improvement Fund or the Maintenance Fund provided in Article IV of this Supplemental Indenture or pursuant to Section 8 of Article VIII of the Original Indenture." UE insists, however, that the quoted parenthetical language provides exceptions to the ten-year restriction on lower interest cost refunding; that the

restriction only applies to "regular" redemptions and does not apply to "special" redemptions.

"Special" redemptions are mentioned in Section 3, Article IV of the 1975 Supplemental Indenture:

> All cash paid to the Trustee for the Improvement fund for Bonds of 2005 Series provided for in Section I of this Article IV shall be held in trust, but not as part of the trust estate, for the benefit of the holders of Bonds of 2005 Series and, if in excess of Fifty Thousand Dollars ($50,000), *shall* be applied to the redemption, on the earliest practical date (but not earlier than the next succeeding May 1) next succeeding the date of payment of such cash, at the *special redemption price* set forth in the form of Bonds of 2005 Series in Section 3 of Article I of this Supplemental Indenture applicable on the date fixed for such redemption, together with accrued interest to the redemption date, of a principal amount of Bonds of 2005 Series equal, as near as may be, to the amount of such cash. . . .
>
> Bonds of 2005 Series shall be redeemable, at any time and from time to time on and after May 1, 1977, for the Improvement Fund for Bonds of 2005 Series provided in Section 1 of this Article IV, and at any time and from time to time on and after March 1, 1975, pursuant to Section 8 of Article VIII of the Original Indenture, at the then applicable special redemption price set forth in the form of Bonds of 2005 Series in Section 3 of Article I of this Supplemental Indenture, together, in each case, with accrued interest to the redemption date.

The "special" redemption price is set at 100% of the par value of the bond, whereas the "regular" price list provides a descending premium upon redemption, starting at 106.88% of par if redeemed during the 12 month period beginning March 1, 1985 and decreasing incrementally to 100% of par if redeemed during the 12 month period beginning March 1, 2004.

The Improvement Fund is established in Section 1, Article IV of the 1975 Supplemental Indenture (the indentures of prior series of bonds establish separate Improvement Funds for each bond series) which calls for UE to pay to the Trustee each year, beginning in 1977, "a sum in cash equal to one percent" of the principal amount of outstanding Series 2005 Bonds. The section further provides that UE may satisfy the 1% Improvement Fund deposit—"the Company may credit against such Improvement Fund"—with certain property additions in lieu of cash. Until the deposit of $700,000 cash for the Series 2005 Improvement Fund in 1978, UE had never deposited cash to satisfy the Fund for any series of its bonds but had always utilized property credits instead.

There is only one Maintenance Fund for the benefit of all outstanding series of bonds. The 1941 Supplemental Indenture created it, but the 1958 Supplemental Indenture made some changes in the Maintenance Fund provisions. The 1975 Supplemental Indenture states that satisfaction of the 1958 Maintenance Fund requirements shall be deemed full compliance with the 1941 Indenture terms. UE is required each year to deposit with the Trustee for the Maintenance Fund an amount of cash, referred to as the "basic replacement requirement," equal to fifteen percent (15%) of the gross operating revenues of the company for the preceding year, less the total amount spent by the company for maintenance and repairs and the amount of the Improvement Fund required to be paid under the 1941 Indenture. There is also an "additional replacement requirement" which may have to be deposited under certain circumstances. Instead of paying cash into the Maintenance Fund, the indentures provide that UE may elect to apply certain credits, including property additions, if available. Prior to 1978, UE had always satisfied the Maintenance Fund requirements by electing to credit property additions instead of depositing cash with the Trustee.

UE asserts authority to effect a special redemption from cash deposited for the Maintenance Fund. The section of the 1975 Indenture which continues the Maintenance Fund does not mention redemptions. It does provide, however, that all cash paid in for the Maintenance Fund shall be held and applied as part of the trust estate. Another section provides that any cash held as part of the trust estate may be used to redeem bonds at UE's request. And yet a different section provides that a redemption shall be at "special" redemption prices.

Plaintiffs argue, though, that these provisions cannot be interpreted to permit redemptions directly from the Maintenance Fund cash.

Plaintiffs' amended petition sought a declaration that UE could not proceed with the contemplated redemption. But if it was decided that UE could redeem, plaintiffs also sought a determination that the selling Prospectus failed to adequately disclose the redemption features of the Series 2005 Bonds in violation of applicable securities laws. UE moved for a separate trial on the issue of whether in fact it did have the right under the Bond Mortgage and Deed of Trust, as supplemented by subsequent Supplemental Indentures, to redeem the bonds as it had planned. UE's motion for partial summary judgment sought judgment on that issue alone and did not address the Prospectus disclosures issue. However, plaintiffs' motion for summary judgment sought judgment on both questions. On December 28, 1979, the trial court entered its memorandum, order and decree granting plaintiffs' motion for summary judgment and denying UE's summary judgment motion. Concurrently, the court overruled UE's motion for separate trial of the contract issue. The court's decree, however, does not mention the Prospectus disclosure question, and we assume the court considered it moot in light of its ruling that the redemption right did not exist. However, our determination that UE does have the right to redeem under the bond contract, revives the issue of whether the Prospectus adequately disclosed the redemption

possibilities. That issue, though, is not properly before us as the trial court did not reach it. Upon remand the trial court will have the opportunity to make its judgment on the adequacy of the Prospectus in the light of our holding.

In its memorandum, the trial court announced that in construing the indentures and Bond Contract it would give deference to the intentions of the parties in the light of existing law and circumstances. The court's decree included the following paragraph 14A:

> 1. No Series 2005 Bonds may be redeemed by Union Electric or St. Louis Union prior to March 1, 1985, if the monies for such redemptions are obtained by Union Electric, directly or indirectly from or in anticipation of borrowings by or for the account of Union Electric, the Improvement Fund for Series 2005 Bonds, the Maintenance Fund or the trust estate, at an effective interest cost (computed in accordance with generally accepted financial practices) of 10.60% per annum, or less; and
>
> 2. Neither the Maintenance Fund, Improvement Fund, or the trust estate shall be used as a vehicle for the general redemption of bonds nor as a device to circumvent the prohibition against refunding or the regular redemption prices; and
>
> 3. Any cash paid by Union Electric to the Maintenance Fund provided for in Article IV of the 1975 Supplemental Indenture shall be only from its operating revenues and such payments, shall in no wise exceed 15% of the operating revenues of Union Electric annually, and shall be reduced by all non-cash credits available under the terms of the Indentures and as described in Section 5 of said Article IV; and
>
> 4. The bond redemption provisions of Article VIII, Section 8, of the Original Indenture, as amended by the May 1,

1941 Supplemental Indenture, (pertaining to the application of monies deposited with the Trustee in connection with releases of property or on account of damage or destruction of property) do not apply to monies held by the Trustee in, as a part of, or for the account of the Maintenance Fund or any Improvement Fund for bonds of any series; and

5. The Special Redemption Price of 100% of principal amount referred to in Section 3 of Article IV of the 1975 Supplemental Indenture applies only to cash received for the Improvement Fund as computed under the provisions of Section 1 of Article IV of the 1975 Supplemental Indenture and paid directly into said Fund by Union Electric; provided, however, that such payment shall in no wise exceed $700,000 per annum and shall be reduced by all non-cash credits then available under the terms of the Indentures. All other redemption of Bonds shall be at the Regular Redemption Prices set forth in Section 3 of Article 1 of the 1975 Supplemental Indenture.

UE raises numerous grounds for reversal of the trial court's decision. First, it is argued that because the underwriters were not parties to Counts I, II and IV, the case must be reversed as they were affected, interested, and indispensable parties. Second, UE complains that Counts I and II should have been dismissed because they are based on sections of federal securities laws that do not give rise to a private right of action. UE's third point alleges that the lower court should have declined to assume jurisdiction over the request for declaratory relief, because it "required a judicial investigation of disputed and complicated facts." The fourth allegation of error concerns the trial court's use of extrinsic evidence to interpret the bond contract—UE insists that the bond contract is written clearly and unambiguously, and consequently the parol evidence rule prohibits the consideration of extrinsic evidence in interpreting the meaning of the written language. UE's final point on appeal

alleges *inter alia* that the decree "is unsupported by any recognized legal principles or admissible evidence," and that summary judgment for plaintiffs was erroneous because plaintiffs did not establish the construction the court gave to the bond contract by "unassailable proof" as required by Rule 74.04(h).

UE argues that the four managing underwriters, who negotiated and placed the Series 2005 Bond offering, should have been joined as parties in this proceeding. UE cites §527.110, RSMo 1978: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." It also asserts Rule 52.04(a) by reason of the underwriters' "interest."

Plaintiffs maintain that the underwriters do not have and do not claim an "interest" in the proceeding which would require joinder under § 527.110 or Rule 52.04(a)(2). The underwriters, in an *amicus curiae* brief filed with this court, also assert that they have no interest in the contract interpretation issue presented by Counts I, II and IV, and we agree.

It has been said that:

> An "interest" which compels joinder does not include a mere consequential, remote or conjectural possibility of being in some manner affected by the result of the original action. It must be such a direct claim upon the subject matter of the action that the joined party will either gain or lose by direct operation of the judgment to be rendered.

State ex rel. Emcasco Insurance Co. v. Rush, 546 S.W.2d 188, 197 (Mo.App. 1977). *See also Dick v. Shannon,* 596 S.W.2d 79, 84 (Mo.App. 1980). The underwriters will not be affected in such a direct manner as would require their joinder here. Any effect upon them is merely conjectural and consequential. Their liability for Prospectus disclosures is not the subject matter of

this action and is not settled by this decision. In the Motion to Intervene in Counts I, II and IV filed by the underwriters with the trial court they asked to be made parties to those counts, or, *alternatively,* to sever the contract issue for separate trial. The underwriters' motion was effectively granted, even though the court purported to deny it, as the court's decree is in fact limited to the contract issue. Thus, the underwriters have been granted all the relief they requested and appear to be fully satisfied that they do not have an interest that has been prejudiced by the proceedings thus far.

The remaining question that UE has raised under Rule 52.04(a)(1) is whether the underwriters should be joined because in their absence "complete relief cannot be accorded among those already parties." A declaration of redemption rights of UE's Series 2005 Bonds provides complete relief on the contract issue when the bondholders and the company are parties, and participation of the underwriters would add nothing between UE and plaintiffs.

UE's second point on appeal is that insofar as the court's decree is based on Counts I and II it is improper because both counts should have been dismissed. UE asserts that the Trust Indenture Act of 1939, § 323)a) (15 U.S.C. § 77 www), upon which Count I is based, does not provide a cause of action regarding disclosure of redemption provisions in a trust indenture. And even if it does, UE raises a statute of limitations defense. Also, UE maintains that Count II, based upon the Securities Act of 1933, § 17(a) (15 U.S.C. § 77q)), should have been dismissed, because there is no private right off action under § 17(a). *Shull v. Dain, Kalman & Quail, Inc.,* 561 F.2d 152, 159 (8th Cir. 1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).[3] Because the trial court did not reach the

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[3] The court noted that in *Greater Iowa Corp. v. McLendon,* 378 F.2d 783, 788-90 (8th Cir. 1967), it had held that the private right of action must be found in § 12(2) of the Securities Act of 1933 and not in § 17(a). *Id.* at 155.

merits of the disclosure claims, we need not decide this issue now. The decree only interprets the bonds contract and declares the rights of the parties. Count IV alone adequately requested such declaratory relief. Upon remand, the trial court will have the opportunity to explore fully whether the securities laws claims of Counts I and II are properly before it.

UE next contends that the trial court should have declined to enter a declaratory judgment under Count IV because it required a "judicial investigation of disputed and complicated facts," citing 22 Am. Jur.2d 862-63. However, our review of the record reveals few facts that are disputed and relevant to the interpretation of the bond contract. Indeed, the decree is almost entirely the curt's opinion of the legal effect of undisputed facts. The trial court did not abuse its discretion by deciding that the contract issue was appropriate for declaratory judgment. *See Missouri Property Insurance Placement Facility v. McRoberts,* 598 S.W.2d 146, 148 (Mo.App. 1978); *State Farm Fire & Casualty Co. v. Powell,* 529 S.W.2d 666, 668 (Mo.App. 1975); Rule 87.07, Mo.R.Civ.P.

UE's fourth allegation of error concerns the admission of extrinsic evidence in interpreting the redemption features of the Series 2005 Bonds. UE argues that the Bond Contract consists of plain and unambiguous printed instruments embodying the parties' entire agreement; consequently, the parol evidence rule prohibits the introduction of any extraneous evidence and the parties' intentions must be determined solely from those instruments. As this was a summary judgment decision, no evidence was "admitted" by the court. But, in any event, the parol evidence rule provides only that parol evidence may not be used to vary or contradict the terms of a complete and unambiguous written contract absent fraud, common mistake, accident or erroneous omission. *Craig v. Jo B Gardner, Inc.,* 586 S.W.2d 316, 324 (Mo.banc 1979). Collateral facts and circumstances may be introduced to ascertain the subject matter of the contract and to aid in its interpretation, but such facts can-

not cause the court to read into the contract something that it does not say, create an ambiguity or show an obligation other than expressed in the written instrument. *Id.*

We conclude that the written instruments comprising the Bond Contract constitute an integrated agreement, *i.e.,* the bond certificate, the Original and Supplemental Indentures, were intended to be a complete recitation of all items and conditions applicable to the Series 2005 Bonds. With this type of instrument, particular care must be taken to ensure that the entire agreement is reduced to writing as it will govern the rights of bondholders who generally take no part in the formulation of the Indentures and therefore are not apprised of any unwritten understandings or provisos concerning the terms of the agreement.

Both parties contend that the Bond Contract is unambiguous—UE aserts that it clearly means one thing, while plaintiffs insist it means another. However, mere disagreement over the meaning of the Contract does not signal an ambiguity. *Crim v. National Life and Accident Insurance Co.,* 605 S.W.2d 73, 76 (Mo.banc 1980); *J. E. Hathman, Inc. v. Sigma Alpha Epsilon Club,* 491 S.W.2d 261, 264 (Mo.banc 1973); *Grantham v. Rockhurst University,* 563 S.W.2d 147, 150 (Mo.App. 1978). Whether the language is ambiguous or not is a question of law for the court. An ambiguity exists when there is more than one reasonable interpretation which dan be gleaned from the contract language. *Id.* The trial court concluded after considering the surrounding circumstances that there was only one reasonable interpretation of the contract.

In *Cure v. City of Jefferson,* 380 S.W.2d 305, 310-11 (Mo. 1964), the standards of the Restatement of the Law of Contracts were applied to interpret a disputed contract. Sections 230 and 235 of the Restatement specifically set forth the guidelines for contruing an integrated agreement and allow consideration to

be given to attending circumstances. Given the principles applied in *Cure v. City of Jefferson,* we cannot say that the trial court erred because it went beyond the words of the instruments and considered the surrounding circumstances. The authorities make it apparent, however, that it is error to use parol evidence to vary, contradict, modify, enlarge, or curtail the terms of an agreement that on its face is free from ambiguity. The court's decree reflects this error.

The circumstances surrounding the formation of the written instruments are essentially non-disputed. The Series 2005 Bonds were a negotiated issue, with the managing underwriters advising what the coupon rate and terms should be in order to successfully market the bonds. UE's prior series of bonds were subject to redemption by UE in whole or in part at any time before maturity upon thirty days' notice and payment of a premium above par. UE was advised that because of fluctuating interest rates and uncertain conditions in the investment market, a coupon rate of 10½% would probably also have to feature a ten year "nocall" (non-redemption) provision. If this provision was not included, then it was considered that 10¾% should be the minimum rate, and even then there could be no guarantee of successful placement. UE was further told that a five year "no-call" period would not suffice. Thus, a third paragraph was added to § 1, Article III, of the 1975 Supplemental Indenture—this is the section that generally provides for the redemption of bonds at premium prices—to restrict UE's redemption privilege:

> Irrespective of the provisions of this Section 1, Bonds of 2005 Series shall not be redeemable at the option of the Company at any time prior to March 1, 1985 (*other than by the operation of the Improvement Fund or the Maintenance Fund provided in Article IV of this Supplemental Indenture or pursuant to Section 8 of Article VIII of the Original Indenture)* if moneys for such redemption are obtained by the Company directly or indirectly

> from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum. [emphasis added].

As mentioned, UE had never satisfied Improvement Fund or Maintenance Fund requirements with cash and consequently no redemptions had ever been made "by the operation of" those funds.

Plaintiffs argue that the third paragraph of § 1, Article IV, of the 1975 Indenture should be read to mean effectively: "No redemptions of any kind if the funds for it were obtained at less than 10.6% interest." We note initially that bondholders are charged with knowledge of the contents of the trust indenture where the bond certificate refers to the terms of the indenture. *Rothschild v. Jefferson Hotel Co.*, 56 F.Supp. 315, 318 (E.D. Mo. 1944); *Muren v. Southern Coal & Mining Co.*, 177 Mo.App. 600, 605, 160 S.W. 835, 836 (1913). Not only does the reverse side of UE's Series 2005 Bond Certificate refer to the indenture, it gives a brief explanation of the redemption features.

The first paragraph of the 2005 Bond Certificate is structured similarly to the third paragraph of § 1, Article IV, 1975 Indenture. It contains the parenthetical clause "otherwise than for the Improvement Fund hereinafter mentioned or upon application of moneys included in the trust estate." We believe this language serves to clarify that there are two distinct categories of redemptions, "special" and "regular", but that the "specials" — *i.e.*, those for the Improvement Fund or upon application of moneys included in the trust estate — are not subject to the restriction on lower interest cost refunding. Plaintiffs' argument that a parenthetical only modifies language preceeding it and cannot modify any clauses following it would leave the parenthetical without discernable meaning. Furthermore, the paragraph following the parenthetical provides that special redemptions may commence in 1975 or 1977 but makes

no mention of the restriction prior to 1985. A precept of contract consideration is that, if possible, a court will give effect to all parts of an instrument, and a construction that gives a reasonable meaning to all its provisions will be preferred to one that leaves a portion of the writing useless or inexplicable. *E.g., Yamnitz v. Polytech, Inc.*, 586 S.W.2d 76, 80 (Mo.App. 1979). In light of the foregoing, we conclude that the Bond Contract's restriction on redemptions with borrowed funds does not apply to special redemptions, and the language is unambiguous on its face concerning this point.

The question remains whether the extrinsic evidence can create an ambiguity and provide another possible interpretation to this otherwise clear language. We believe not. Plaintiffs argue that they thought they were getting "solid" protection against lower interest cost refunding and that UE's top executives were under the same impression. Thus, we should ascribe that meaning to the language. However, plaintiffs' understanding of the redemption protection is found largely on the fact that special redemptions had never been pursued in the past. And, basically, plaintiffs assumed that they would not be done in the future. UE's executives simply admit that they were not aware of the possibility of a special redemption. It was not until another public utility company announced its plans for a redemption that UE decided to explore the possibility of redemption in a similar manner. These circumstances cannot alter the clear import of the written instrument. If *absolute* protection from lower interest cost redemption for ten years was intended, as plaintiffs contend, the indenture would have been so drafted. Instead, the bonds were merely subject to a limited risk of special redemption — limited in the sense that the amount of bonds redeemable cannot exceed the 1% Improvement Fund deposits and the replacement requirements of the Maintenance Fund. The extrinsic evidence does not convince us that the otherwise unambiguous language is susceptible of any other reasonable interpretation, and we conclude as a matter of law that the Bond Contract's lower interest cost refunding restric-

tion does not apply to special redemptions. To the extent the trial court's decree reflects a contrary view, and it does at various points, it is in error.

The next issue is whether redemptions can be made directly out of cash that has been deposited with the Trustee to satisfy Maintenance Fund requirements. UE asserts that the indentures permit this because § 5, Article IV, of the 1975 Indenture, which continues the Maintenance Fund, while not mentioning redemption, does state: "All cash received by the Trustee for the Maintenance Fund pursuant to this Section 5 shall be held and applied as part of the trust estate....[4] And § 8, Article VIII, of the Original Indenture, dealing with the "Application of Moneys received by the Trustee", provides that:

> Any moneys held by the Trustee as part of the trust estate (other than moneys held on account of prior lien bonds or judgment liens), and not paid over to the Company pursuant to other provisions of this Article VIII, shall, at the election and in accordance with the request of the Company, evidenced by a certified resolution, be applied by the Trustee from time to time to the purchase of Bonds outstanding hereunder (of such series and within

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[4] The complete paragraph provides:

> All cash received by the Trustee for the Maintenance Fund pursuant to this Section 5 shall be held and applied as part of the trust estate, and shall be paid over from time to time to the Company upon compliance with Section 1 or Section 3 of Article VIII of the Original Indenture or Section 6 of this Article IV or Section 6 of Part IV of the Supplemental Indenture of May 1, 1941 or Section 6 of Article IV of any of the Supplemental Indentures creating prior series of Bonds, or, if not so paid over within one year from the date of such deposit, and not added to the improvement funds for Bonds of prior Series as provided in the respective Supplemental Indentures creating such series, shall, at the election of the Company, be added to the Improvement Fund for Bonds of 2005 Series provided for in Section 1 of this Article IV.

> such limitations as to price as may be specified in the resolution) or to the redemption of such Bonds in accordance with the terms thereof....

Under the foregoing, UE asserts authority to make a cash deposit to the Maintenance Fund, and because that cash is held and applied as a part of the trust estate, it may elect to apply it to redeem such series of bonds as it chooses. Such redemption, because it is accomplished "pursuant to Section 8 of Article VIII of the Original Indenture," is at the special redemption price. *See* Section 3, Article IV, of the 1975 Supplemental Indenture set out *supra*.

Plaintiffs disagree and argue that these provisions cannot be construed to permit a redemption directly from Maintenance Fund cash. They contend that, in effect, such cash must be held as a "trust within a trust", and cannot be used for debt retirement purposes, that cash paid into the Maintenance Fund must come from operating revenues, not borrowed funds; that if property addition credits can reduce cash payment obligations such credits must be used because of UE's custom to do so.

We agree with UE's explanation of the indenture provisions. Section 5 of Article IV (*see* note 4, *supra*) clearly says that such cash shall be held as part of the trust estate. It gives no indication that it is to be a trust within a trust. Plaintiffs' argument that such cash *must* be added to Improvement Funds for any prior series bonds if not otherwise paid over to the Company is unconvincing. Payment over to the Improvement Funds is plainly an "election of the Company."

However, notwithstanding our conclusion that the language of the indenture permits the use of Maintenance Fund cash for redemptions, plaintiffs urge us to find that doing so would violate the intended purpose of the Maintenance Fund, which is obviously to maintain the value of the mortgaged property. While such funds are not generally viewed as debt-retirement funds, there is precedent for allowing the funds to be put to that

purpose, provided the particular trust indenture allows it. For example, *Gourielli's Estate v. Commissioner,* 289 F.2d 69, 72 (2d Cir. 1961), *rev'd sub nom. on other grounds, Hanover Bank v. Commissioner,* 369 U.S. 672, 82 S.Ct. 1080, 8 L.Ed.2d 187 (1962), and *Parnell v. United States,* 187 F.Supp. 576, 578 (M.D. Tenn. 1958), while not involving actual redemption, did recognize a utility's right to use a maintenance fund to do so.

Next is plaintiffs' contention that any cash deposited with the Trustee for Maintenance Fund purposes must have come directly from operating revenues and cannot be borrowed money. This assertion is based on the language of the indenture which describes the fund requirements in terms of a percentage of gross operating revenues, that is, "an amount of cash (herein sometimes referred to as the 'basic replacement requirement') equal to fifteen percent (15%) of the gross operating revenues of the Company...." We believe, however, that this language only defines the amount and not the source of the cash. Our view is bolstered by the next clause which describes an additional deposit that may be necessary as:

> [A]n additional amount of cash (herein sometimes referred to as the "additional replacement requirement") equal to the amount, if any, by which the product of the applicable percentage (as hereinafter defined) and the arithmetical average of the amounts of depreciable property (as hereinafter defined) at the beginning and at the end of such preceding calendar year exceeds the basic replacement requirement....

While the above clearly is a mouthful, it also is clear that it describes an amount of cash and does not delineate the source of such cash. It would be unreasonable to read into the indenture a restriction against using borrowed cash to satisfy the requirements. Neither the language of the indentures nor the attendant circumstances convinces us that the bond contract, as a matter of law, restricts the source of cash for the Maintenance

Fund. To the extent the trial court's decree holds otherwise, it is erroneous.

A further question concerns the use of available property credits toward satisfaction of the Improvement and Maintenance Funds. The indentures provide that in lieu of the cash requirements UE may, at its election, credit certain property additions instead. Using the available credits had always been UE's practice, which, according to plaintiffs, restricts UE to its past practices. But plaintiffs ignore the manifest language of the indentures that gives UE the *option* to use credits instead of cash. Plaintiffs have cited numerous cases recognizing the doctrine that customs and usages may by implication become part of a contract. *E.g., City of Webster Groves v. Institutional and Public Employees Union,* 524 S.W.2d 162, 167 (Mo.App. 1975). However, custom and usage may be used only to remove ambiguities, not to contradict the plain meaning of a written contract. *Heiden v. General Motors Corp.,* 567 S.W.2d 401, 404-05 (Mo.App. 1978). We hold that UE has the right to elect whether or not to use available property credits against the Improvement Fund or Maintenance Fund requirements.

Plaintiffs have argued that the third paragraph of § 3, Article IV, of the 1975 Indenture[5] supports their contention that lower

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[5] The paragraph reads:

> All Bonds of 2005 Series delivered to the Trustee in lieu of cash or redeemed by operation of the Improvement Fund for Bonds of 2005 Series in accordance with the provisions of this Article IV, shall forthwith be cancelled by the Trustee and shall be delivered to the Company. Bonds of 2005 Series so cancelled shall not be reissued, and, so long as any Bonds of 2005 Series are outstanding, no additional Bonds shall be authenticated and delivered in substitution for Bonds of 2005 Series so cancelled or in substitution for Bonds of [prior series] delivered to the Trustee in lieu of cash otherwise payable into the improvement funds for any of such series, or redeemed by operation of such funds, in accordance with the provisions with respect to the operation of such funds contained in the Supplemental Inden-

interest cost refunding is absolutely prohibited. The reasonable interpretation of this paragraph is that if UE desires to replace such cancelled bonds with another issue of bonds, it must properly authenticate the new bonds, *i.e.*, it must deliver to the Trustee an additional amount of property to become subject to the mortgage. The property that originally served as the basis for authentication of the retired bonds is not released from the mortgage. In other words, the new bonds cannot be issued simply "in substitution" for the retired bonds; they must be "in addition" to them.

We hold in accordance with the foregoing discussion that the court erred in granting plaintiff's motion for summary judgment and that as a matter of law UE's motion for partial summary judgment should have been granted.

Our conclusions mandate extensive modifications to the trial court's declaration of contractual redemption features. We shall discuss each of the five sub-paragraphs of paragraph 14A of the decree (fully set out *supra*):

1. The restriction on the use of funds borrowed at less than 10.6% does not apply to redemptions from Improvement Fund cash or via Article VIII, § 8, of the Original Indenture, which includes cash deposited with the Trustee for the Maintenance Fund requirements.

2. This paragraph is somewhat cryptic in that it proscribes using the Maintenance or Improvement Funds for the "general

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tures [creating prior series Bonds], and no cash included in the trust estate shall be withdrawn, nor shall the amount of cash required to be paid into the trust estate under any provision of the Original Indenture, the Supplemental Indentures creating prior series of Bonds or this Supplemental Indenture be reduced, on the basis thereof.

redemption" of bonds. We note, though, that the amount of bonds that may be specially redeemed by the Improvement or Maintenance Funds at any one time is limited to the amount of cash that remains on deposit with the Trustee for such funds. If UE desires to redeem more bonds than the Trustee holds the cash for, such excess amount must be redeemed at the regular redemption price and in accordance with any applicable restrictions on regular redemptions.

3. Cash for the Maintenance Fund does not have to come from operating revenues and the only mandatory credit is the amount spent for maintenance and repairs.[6] Also, the Maintenance Fund requirement conceivably may exceed 15% of operating revenues if an "additional replacement requirement" is necessary under Article IV, § 5, 1958 Supplemental Indenture.

4. The bond redemption provisions of Article VIII, § 8, of the Original Indenture do apply to cash deposited with the Trustee pursuant to Maintenance Fund requirements. That section, of course, does not apply to Improvement Fund deposits as they are not held as part of the trust estate.

5. The special redemption price can apply only to cash paid directly into the Improvement Fund by UE but, as plaintiffs have mentioned, may apply also to cash that is first deposited for the Maintenance Fund and then transferred to the Improvement Fund pursuant to Article IV, § 5, par. 2, 1975 Supplemental Indenture. The non-cash credits to the Improvement Fund are not mandatory. Furthermore, as long as the cash has been properly deposited into the Improvement Fund, we see no reason why there should be a limit on the amount of cash that may be expended for redemption in any one year. The special redemption price also applies to the redemptions via § 8, Article VIII, of the Original Indenture, including cash in the trust estate pursuant to Maintenance Fund requirements.

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[6] The 1958 Supplemental Indenture makes maintenance and repairs a mandatory credit but is an elective credit in the Original Indenture.

We emphasize that our determination of the redemption features under the bond contract has not taken into consideration the Prospectus applicable to the Series 2005 Bonds.[7] Upon remand the trial court will have the opportunity to determine whether the Prospectus disclosure issues are properly before it, and, if so, to determine the adequacy of such disclosure with regard to the redemption features of the Series 2005 Bonds.

Reversed and remanded for further proceedings in accordance with this opinion.

PUDLOWSKI, P. J., and WEIER, J., concur.

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[7] There is some suggestion in the pleadings, but no party has urged it in the briefs, that a mutual mistake concerning the proper interpretation of the bond contract may be involved here. We have concluded, however, that such a theory of relief would not be appropriate considering the procedural stance of this case and that the Prospectus and disclosure issues are not properly before us.

APPENDIX H

March 19, 1975, Final Prospectus; Cover Page and Pages 3, 4, 5, 8, 28, 29, 30, 31, 34, 43 and 44
(Plaintiff's Exhibit 10)

[NOTE: The pages appearing here were reduced, photographed and reprinted directly from the original Prospectus.]

PROSPECTUS

$70,000,000

Union Electric Company

First Mortgage Bonds, 10½% Series due 2005

Interest payable on March 1 and September 1 **Due March 1, 2005**

The New Bonds are redeemable, at the option of the Company, at the redemption prices set forth herein, provided that, prior to March 1, 1985, the Company may not redeem any of the New Bonds (other than through the Improvement Fund or by the application of certain moneys in the Maintenance Fund or otherwise in the trust estate) from or in anticipation of funds borrowed having an interest cost to the Company of less than 10.60% per annum.

Application has been made to list the New Bonds on the New York Stock Exchange.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to Public(1)	Underwriting Discount(2)	Proceeds to Company(1)(3)
Per Unit	100.00%	.875%	99.125%
Total	$70,000,000	$612,500	$69,387,500

(1) Plus accrued interest from March 1, 1975 to the date of delivery and payment.
(2) The Company has agreed to indemnify the several Underwriters against certain civil liabilities, including liabilities under the Securities Act of 1933.
(3) Before deduction of expenses payable by the Company estimated at $165,000.

The New Bonds are offered subject to prior sale, when, as and if delivered to and accepted by the Underwriters. The Underwriters reserve the right to withdraw, cancel or modify such offer and to reject orders in whole or in part. It is expected that delivery of the New Bonds will be made in New York, N. Y., on or about March 26, 1975.

Merrill Lynch, Pierce, Fenner & Smith
Incorporated

Halsey, Stuart & Co. Inc.
Affiliate of Roche & Co. Incorporated

Lehman Brothers
Incorporated

White, Weld & Co.
Incorporated

The date of this Prospectus is March 19, 1975

THE ISSUE IN BRIEF

The following material is qualified in its entirety by the detailed information and financial statements appearing elsewhere in this Prospectus.

THE OFFERING

Security Offered	$70,000,000 First Mortgage Bonds due March 1, 2005
Interest Payment Dates	March 1 and September 1
Redemption Provision	Non-refundable, otherwise than through the Improvement Fund or by the application of certain moneys in the Maintenance Fund or otherwise in the trust estate, at a lower interest cost prior to March 1, 1985
Use of Proceeds	To reduce short-term borrowings used primarily for construction
Listing	Application has been made to list the New Bonds on the New York Stock Exchange

THE COMPANY

Business	Primarily an electric utility
Service Area (See "Map")	Electric service to approximately 24,000 square miles, primarily covering the eastern, southeastern and central portions of Missouri, portions of Illinois adjacent to St. Louis, Missouri, and the southeastern portion of Iowa; gas service to Alton, Illinois and vicinity and 91 Missouri communities; steam service to downtown St. Louis, Missouri; water service to Cape Girardeau, Missouri.
Service Area Population (estimated)	Electric—2,648,000; Gas—330,000
Customers	Electric—904,000; Gas—104,000
Revenue Distribution (12 Months Ended 12/31/74)	Electric—94.5%; Gas—3.8%; Other—1.7%
Sources of kWh Generation (12 Months Ended 12/31/74)	Coal—91%; Hydro—8%; Oil—1%

CONSOLIDATED FINANCIAL INFORMATION

(Thousands of Dollars) — 12 Months Ended

	December 31, 1973	December 31, 1974	January 31, 1975
Operating Revenues	$ 417,949	$ 468,656	$ 480,972
Net Income	$ 67,167	$ 59,786	$ 62,343
Ratio of Earnings to Fixed Charges			
Actual	2.33	1.92	1.96
Pro Forma	—	1.86	1.93
Utility Plant, net (at end of period)	$1,696,198	$1,883,136	$1,889,383

	Capitalization as of January 31, 1975			
	Actual	Ratio	As Adjusted*	Ratio*
Long-term Debt	$ 939,866	53.1%	$1,009,254	54.8%
Preferred Stock	282,551	16.0	282,551	15.4
Common Equity	548,617	30.9	548,617	29.8
Total Capitalization	$1,771,034	100.0%	$1,840,422	100.0%
Short-term Notes Payable	$ 129,460		$ 60,073	

* Adjusted to give effect to the sale of the New Bonds offered hereby (see "Capitalization").

BEST AVAIL

APPLICATION OF PROCEEDS AND CONSTRUCTION PROGRAM

The net proceeds from the sale of the New Bonds (estimated at $69,222,500), which will initially become part of the general funds of the Company through reimbursement of its treasury for capital expenditures heretofore made, will be used to partially retire short-term bank loans and commercial paper notes, expected to aggregate approximately $125,000,000 at the time of the sale of the New Bonds. Such short-term debt was incurred primarily to meet the cost of continuing additions to property and plant.

Expenditures for the construction program aggregated $199,000,000 for the year 1974 and are expected to aggregate approximately $198,000,000 for the year 1975. The Company anticipates that its cash requirements for 1975 will be obtained from internally generated funds, interim short-term borrowings, and other forms of financing, including the proposed sale of $21,000,000 principal amount of tax-exempt revenue bonds through the State Environmental Improvement Authority of the State of Missouri in mid-year and the proposed sales of Common and Preferred Stock late in the year. In addition, Union Colliery Company proposes to obtain funds in 1975 through the issuance of tax-exempt revenue bonds by the State Environmental Improvement Authority of the State of Missouri and the Illinois Industrial Pollution Control Financing Authority. The Company presently anticipates that approximately 30% of its cash requirements for the year 1975 will be obtained from internally generated funds.

The construction program described herein reflects the actions taken by the Company in December 1974, when it rescheduled the in service dates of Units Nos. 1 and 2 of the Rush Island Plant from mid-1975 to late 1975 and from mid-1976 to early 1977, respectively; cancelled plans to build Units Nos. 3 and 4 of such Plant, substituting therefor combustion peaking turbines; and deferred certain smaller system projects. Such projects include transmission lines, distribution lines, substations and related rights-of-way acquisition costs for customer projects, which were deferred because work thereon did not progress as rapidly as anticipated, and other transmission lines which were deferred because the need for such lines was reduced by the substitution of the peaking units, since such units afford the opportunity for better utilization of existing transmission facilities due to greater siting flexibility. The rescheduling of the in service dates of Units Nos. 1 and 2 was caused by work stoppages by construction workers in December 1974 and earlier, and resulted in minor increases in construction costs. The cancellation of Units Nos. 3 and 4 and substitution therefor of combustion peaking turbines resulted in an aggregate net reduction of $400,000,000 in estimated construction expenditures, of which approximately $55,000,000 is applicable to 1975 (for information concerning costs associated with the cancellation, see Note 11 to "Notes to Financial Statements"). The deferral of the smaller system projects resulted in a rescheduling of approximately $40,000,000 of 1975 expenditures to later dates throughout the 1975-1979 period. The Company believes that such actions will have no effect on reliability of service to its customers or on the amount of power required to be purchased.

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The following table sets forth certain information with respect to the principal generating and other facilities currently under construction or planned by the Company:

Plant Name and Location	Net Kilowatt Capacity	Expected In Service Date(1)	Estimated Cost Per Kilowatt	Expenditures Through 1974 (Actual)	Estimated Expenditures 1975	Estimated Expenditures After 1975	Total
					(Thousands of Dollars)		
GENERATING							
Rush Island Plant (2) Jefferson County, Mo.							
Unit No. 1	575,000	Fall 1975	$371	$ 160,619	$ 49,620	$ 3,061	$ 213,300
Unit No. 2	575,000	Spring 1977	260	64,770	32,628	52,050	149,448
Total				$ 225,389	$ 82,248	$ 55,111	$ 362,748
Callaway Plant (3) Callaway County, Mo.							
Unit No. 1	1,150,000	1981	$813	$ 11,941	$ 14,490	$ 908,016	$ 934,447
Unit No. 2	1,150,000	1983	788	5,960	7,969	892,031	905,960
Total				$ 17,901	$ 22,459	$1,800,047	$1,840,407(4)
Combustion Peaking Turbines (5)	1,400,000	1978-81	$164	$ —	$ —	$ 229,106	$ 229,106
OTHER							
Solid Waste Utilization System (6) Metropolitan St. Louis Area		Mid 1977		$ 935	$ 10,371	$ 58,694	$ 70,000

(1) During periods of initial operation, the availability of large nuclear and fossil-fueled generating units (such as the Rush Island and Callaway Units), as well as the capacity at which such units may be operated, may be restricted because of, among other reasons, limitations placed on operations by regulatory agencies and matters related to environmental protection.

(2) Coal fueled.

(3) Nuclear fueled.

(4) Includes initial fuel loading of $82,400,000.

(5) Oil fueled.

(6) See "Solid Waste Utilization System" under "Business and Property".

Actual expenditures will vary from estimates due to a number of factors, including changes in equipment delivery schedules and availability of materials, construction delays, regulatory action, changes in business conditions and changes in scheduled in service dates. For example, the Company's actual construction expenditures were less than originally estimated in the year 1972 by $41,000,000, because of construction delays on Labadie Plant Unit No. 4; in 1973 by $16,000,000, because of delays in obtaining construction permits for the Rush Island Plant; and in 1974 by $42,000,000, because of work stoppages and construction delays on Rush Island Units Nos. 1 and 2. As indicated under "Environmental Matters" under "Business and Property", governmental action to protect the environment may cause the Company's costs to vary widely from their current estimates. In addition to the funds required for construction mentioned above, reference is made to Note 6 to "Notes to Financial Statements" for information as to debt to be retired during the five year period 1975-1979.

CONSOLIDATED STATEMENT OF EARNINGS

The following consolidated statement of earnings for the five calendar years ended December 31, 1974 has been examined by Price Waterhouse & Co., independent accountants, whose report thereon appears elsewhere in this Prospectus. This statement of earnings should be read in conjunction with the other consolidated financial statements and notes thereto included elsewhere in this Prospectus.

	Year Ended December 31,				
	1970	1971	1972	1973	1974
	(Thousands of Dollars)				
OPERATING REVENUES:					
Electric	$302,687	$325,964	$357,606	$399,161	$443,044
Gas	10,735	11,796	13,679	14,527	17,877
Steam	3,306	3,148	3,903	4,261	7,735
Total operating revenues	$316,728	$340,908	$375,188	$417,949	$468,656
OPERATING EXPENSES:					
Operations					
Fuel(A)	42,788	52,482	60,823	74,332	103,900
Purchased power	12,012	20,058	29,464	3,913	12,329
Other	57,456	61,595	66,979	76,273	75,271
	$112,256	$134,135	$157,266	$154,518	$191,500
Maintenance	22,462	25,363	31,564	35,039	41,913
Depreciation (Note 1)	38,093	43,336	44,784	49,811	53,016
Taxes, other than income taxes	40,452	47,105	52,863	60,471	65,653
Income taxes (Notes 1 and 2)	19,200	4,535	560	6,850	3,573
Total operating expenses	$232,463	$254,474	$287,037	$306,689	$355,655
OPERATING INCOME	$ 84,265	$ 86,434	$ 88,151	$111,260	$113,001
OTHER INCOME AND DEDUCTIONS:					
Allowance for funds used during construction(B)	14,092	13,457	13,377	10,521	13,696
Miscellaneous, net	(48)	494	578	99	1,154
Total other income and deductions	$ 14,044	$ 13,951	$ 13,955	$ 10,620	$ 14,850
GROSS INCOME	$ 98,309	$100,385	$102,106	$121,880	$127,851
INTEREST AND OTHER CHARGES:					
Interest on debt	38,478	43,603	48,556	54,612	67,964
Amortization of premium and discount, less expense, on debt (Note 3)	(289)	(192)	(147)	(141)	(141)
Preferred dividends of subsidiary	242	242	242	242	242
Total interest and other charges	$ 38,431	$ 43,653	$ 48,651	$ 54,713	$ 68,065
NET INCOME	$ 59,878	$ 56,732	$ 53,455	$ 67,167	$ 59,786
PREFERRED DIVIDEND REQUIREMENTS OF COMPANY	7,796	10,074	11,312	15,288	15,700
EARNINGS ON COMMON STOCK	$ 52,082	$ 46,658	$ 42,143	$ 51,879	$ 44,086
AVERAGE NUMBER OF COMMON SHARES OUTSTANDING	27,162,204	29,045,701	31,249,023	31,946,291	32,187,113
EARNINGS PER SHARE OF COMMON STOCK (based on average shares outstanding)	$1.92	$1.61	$1.35	$1.62	$1.37
DIVIDENDS DECLARED PER SHARE OF COMMON STOCK	$1.26	$1.28	[illegible]	$1.28	$1.28
RATIO OF EARNINGS TO FIXED CHARGES(C)	3.03	2.39	[illegible]	2.33	1.92

The numerical notes referred to above appear under "Notes to Financial Statements" which should be read in conjunction with the Consolidated Statement of Earnings.

DESCRIPTION OF NEW BONDS

The New Bonds are to be issued under the Indenture of Mortgage and Deed of Trust dated June 15, 1937 between the Company and St. Louis Union Trust Company, as Trustee, as amended and supplemented by supplemental indentures including a Supplemental Indenture to be dated March 1, 1975. Copies of the Mortgage and Deed of Trust and supplements and amendments thereto, herein sometimes called the "Mortgage", are filed as exhibits to the Registration Statement of which this Prospectus forms a part.

The following statements are an outline of certain provisions contained in the Mortgage. They do not purport to be complete and are qualified in their entirety by reference to the Mortgage and by express reference to Sections and Articles noted below. Certain of the terms used herein without definition are defined in the Mortgage.

The New Bonds will mature March 1, 2005, and will bear interest at the rate shown in their title, payable semi-annually on March 1 and September 1 commencing September 1, 1975. Principal and interest are payable at the office of the Trustee in St. Louis, Mo. or at Bankers Trust Company in New York, N. Y.; provided that, at the option of the Company, interest may be paid by checks mailed to the registered owners of the New Bonds. The New Bonds are to be issued as registered Bonds without coupons in denominations of $1,000 or multiples thereof. The New Bonds may be exchanged for other New Bonds of different authorized denominations and may be transferred without charge to the holders thereof other than for applicable governmental taxes.

Redemption. The New Bonds are to be redeemable in whole or in part upon at least 30 days' notice, at the election of the Company, at the applicable Regular Redemption Prices set forth in the following table, expressed in each case in percentages of principal amount, and at a Special Redemption Price of 100% of their principal amount, together with interest accrued to the redemption date; provided, however, that the New Bonds may not be so redeemed at the Regular Redemption Prices prior to March 1, 1985 if moneys for such redemption are obtained by the Company, directly or indirectly, from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum. Regular Redemption Prices apply to all redemptions except in the following cases to which the Special Redemption Price will apply: (a) redemptions for the Improvement Fund for the New Bonds, or (b) redemptions by application of cash in the Maintenance Fund or from certain other moneys included in the trust estate.

12 Month Period Beginning March 1	Regular Redemption Prices	12 Month Period Beginning March 1	Regular Redemption Prices
1975	110.50%	1990	105.07%
1976	110.14	1991	104.71
1977	109.78	1992	104.35
1978	109.42	1993	103.99
1979	109.06	1994	103.63
1980	108.69	1995	103.26
1981	108.33	1996	102.90
1982	107.97	1997	102.54
1983	107.61	1998	102.18
1984	107.25	1999	101.82
1985	106.88	2000	101.45
1986	106.52	2001	101.09
1987	106.16	2002	100.73
1988	105.80	2003	100.37
1989	105.44	2004	100.00

Improvement Fund. So long as any New Bonds are outstanding, the Company will, on or before April 15 in each year beginning with 1977, provide an annual Improvement Fund for the New Bonds in an amount equal to 1% of the greatest principal amount of New Bonds issued prior to January 1 of such year, less New Bonds retired by application of certain moneys included in the trust estate, which amount may either be paid in cash or satisfied (i) by delivery of New Bonds theretofore issued and outstanding, or (ii) by application thereto of 60% of the amount of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien which the Company elects so to use. Moneys paid into the Improvement Fund for the New Bonds are to be applied to the redemption of New Bonds. (March 1975 Supplementary Indenture, Art. IV.) Similar improvement funds are provided for Bonds of prior Series by the supplemental indentures under which such Bonds were issued, except that certain of such funds may be satisfied by application of 100% of the amount of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien which the Company elects so to use.

Maintenance Fund. So long as any New Bonds are outstanding, the Company is required, on or before April 15 in each year, to deposit with the Trustee an amount in cash equal to 15% of its Gross Operating Revenues for the preceding year (after certain deductions including expenditures for maintenance and repairs). Such deposit may be reduced by certain credits, including the amount of property retirements not in excess of property additions, any available balance of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien and the principal amount of Bonds retired (except out of trust estate moneys). Moneys paid into the Maintenance Fund may be added to any of the improvement funds for the New Bonds or Bonds of prior Series and applied to redemption of Bonds to which such improvement fund relates. (1941 Supplemental Indenture, Part IV, Sec. 5; March 1975 Supplemental Indenture, Art. IV, Sec. 5.)

Security. In the opinion of counsel for the Company, Messrs. Keefe, Schafly, Griesdieck & Ferrell, the New Bonds will be secured, together with all other Bonds now or hereafter issued under the Mortgage, by a valid and direct first lien (subject to certain leases, Permitted Liens and other minor matters) on substantially all the properties and franchises of the Company (the principal properties being described under "Principal Utility Properties") other than cash, accounts receivable and other liquid assets, securities not specifically pledged and electric energy, materials, supplies or other products produced or purchased by the Company for use, sale or lease.

The Mortgage contains provisions subjecting after-acquired property (with certain exceptions) to the lien of the Mortgage.

Issuance of Additional Bonds. Additional Bonds ranking equally with the New Bonds may be issued up to (i) 60% of the Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien, (ii) the amount of Bonds retired or to be retired (except out of trust estate moneys), and (iii) the amount of cash deposited with the Trustee for such purpose, which cash may thereafter be withdrawn upon the same basis that additional Bonds are issuable under (i) and (ii). (Art. III.) The New Bonds will be issued against the deposit of cash, which cash will be withdrawn under clause (i) above. At December 31, 1974 the principal amount of Bonds issuable under clause (i) was approximately $205,000,000.

Additional Bonds may not be issued unless Net Earnings of the Company Available for Interest and Property Retirement Appropriations for 12 consecutive months within the 15 months preceding such issuance shall have been equal to the greater of twice the annual interest charges on, or 10% of the principal amount of, all Bonds and Prior Lien Bonds then outstanding and then being issued, nor unless Net Earnings of the Company Available for Interest After Property Retirement Appropriations for such period shall have been equal to twice the annual interest on all such Bonds and Prior Lien Bonds. Such earnings tests need not

be complied with to issue Bonds to refund Bonds theretofore issued or to refund a Prior Lien which simultaneously becomes a Funded Prior Lien upon the Property Additions made the basis of such application, if application to issue additional Bonds for either of these two purposes is made at any time after a date two years prior to the maturity of the Bonds or Prior Lien Bonds being refunded. (Art. III, Sec. 3, 4 and 6; March 1975 Supplemental Indenture, Art. V, Sec. 2.)

Prior Lien Bonds secured by an Unfunded Prior Lien may be issued under the circumstances and subject to the limitations contained in the Mortgage. (Art. IV, Sec. 15 and 16; March 1975 Supplemental Indenture, Art. V, Sec. 4.)

Dividend Restriction. So long as any New Bonds are outstanding, the Company will not declare any dividend on its Common Stock (other than in Common Stock) or make any distribution on or acquire for value any of its Common Stock (otherwise than in exchange for, or out of proceeds of sale of, Common Stock) if the amount thereof, together with the aggregate of all payments made since June 30, 1961 would exceed $22,700,000 plus the net income applicable to the Common Stock subsequent to June 30, 1961. (March 1975 Supplemental Indenture, Art. V, Sec. 6.)

Modification of the Mortgage. With the consent of 80% in amount of Bonds and 80% in amount of Bonds of each affected series if less than all are affected, the Mortgage may be changed except to affect the terms of payment of the principal or interest on any Bond or to reduce the percentage of Bondholders required to effect any change. (Art. XV.)

Insofar as the holders of the Bonds of the 8¾% Series due 2004, of the New Bonds and of subsequently issued Bonds are concerned, the Mortgage is amended by the February 1974 Supplemental Indenture (Art. VII) to include construction work in progress on nuclear facilities and nuclear fuel as bondable property. (March 1975 Supplemental Indenture, Art. VII.)

Defaults. Defaults are defined as being: default in payment of principal; default for 30 days in payment of interest or satisfaction of the Company's obligation respecting any sinking, improvement, maintenance or analogous fund; default in payment of principal of, or interest on, any Prior Lien Bonds; certain events in bankruptcy, insolvency or reorganization; default in other covenants for 60 days after notice by the Trustee or the holders of 15% of the outstanding Bonds; failure under certain circumstances to discharge, or provide for, judgments; or termination of corporate franchise without continuance of business by a successor corporation. (Art. IX, Sec. 1.)

The Trustee or the holders of not less than 25% of the outstanding Bonds may declare the entire principal due on default, but the holders of a majority of outstanding Bonds may annul such declaration if such default has been cured. (Art. IX, Sec. 1.) The Trustee is required to enforce the lien of the Mortgage upon request of the holders of a majority in amount of the outstanding Bonds on default. (Art. IX, Sec. 4.) The Trustee has no obligations to exercise any of its trusts or powers at the request of any of the Bondholders unless indemnified to its satisfaction, but the Trustee is not relieved of its obligation to act upon the occurrence of an event of default. (Art. XIII, Sec. 1.)

Evidence to be Furnished to the Trustee. Compliance with Mortgage provisions is evidenced by written statements by Company officers, opinions of counsel and certificates of an engineer, accountant, appraiser or other expert (who in some instances must be independent). Various certificates and other papers are required to be filed annually and in certain events.

Concerning the Trustee. St. Louis Union Trust Company, St. Louis, Missouri, is the Trustee under the Mortgage, the Trustee under a trust agreement establishing a pension trust for the payment of retirement income

for employees of the Company, and the St. Louis Transfer Agent for the Company's Common Stock. Mr. J. W. McAfee, a Director of the Company, is a Director of St. Louis Union Trust Company and Mr. Edwin S. Jones, Chairman of the Board of Directors of First Union, Incorporated, the parent company of St. Louis Union Trust Company, is a Director of the Company.

EXPERTS

The financial statements, including the "Consolidated Statement of Earnings", included in this Prospectus have been so included in reliance on the report of Price Waterhouse & Co., independent accountants, and on their authority as experts in auditing and accounting.

The statements as to matters of law and legal conclusions under "Rates", "Regulation", "Environmental Matters", "Litigation", and "Description of New Bonds" have been prepared under the supervision of, and reviewed by, Messrs. Keefe, Schlafly, Griesedieck & Ferrell, St. Louis, Missouri, and such statements are made on the authority of that firm as experts.

LEGAL OPINIONS

Certain legal matters in connection with the New Bonds will be passed upon for the Company by Messrs. Keefe, Schlafly, Griesedieck & Ferrell, St. Louis, Missouri, and for the Underwriters by Messrs. Cahill Gordon & Reindel, New York, New York. Messrs. Cahill Gordon & Reindel are not passing upon the incorporation of the Company, franchise matters, questions of title, or the lien of the Company's Mortgage. In giving their opinion as to any matter governed by Missouri or Illinois law, they will rely upon the opinion of Messrs. Keefe, Schlafly, Griesedieck & Ferrell and in giving their opinions as to any matter governed by Iowa law those two firms will rely upon the opinion of Messrs. Concannon, Anderson & McMurray, Keokuk, Iowa. William H. Ferrell, Esq., a member of the firm of Messrs. Keefe, Schlafly, Griesedieck & Ferrell, owns 1,031 shares of the Company's Common Stock, other members of that firm own an aggregate of 575 shares of Common Stock, and one member of that firm owns 25 shares of Preferred Stock, $3.50 Series.

REPORT OF INDEPENDENT ACCOUNTANTS

To the Board of Directors of
UNION ELECTRIC COMPANY

In our opinion, the accompanying consolidated balance sheet and related consolidated statements of long-term debt, capital stock, retained earnings, other paid-in capital and changes in financial position, together with the consolidated statement of earnings appearing elsewhere in this Prospectus, present fairly the consolidated financial position of Union Electric Company and its subsidiaries at December 31, 1974, the results of their operations and the changes in financial position for the five years ended December 31, 1974, in conformity with generally accepted accounting principles consistently applied. Our examinations of these statements were made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

PRICE WATERHOUSE & Co.

St. Louis, Missouri
February 13, 1975

UNION ELECTRIC COMPANY AND SUBSIDIARIES

CONSOLIDATED STATEMENT OF LONG-TERM DEBT

December 31, 1974

(Thousands of Dollars)

LONG-TERM DEBT (Note 6):	
Union Electric Company	
First mortgage bonds—see note (a)	
2⅛% Series due 1980	$ 25,000
3¼% Series due 1982	30,000
3¾% Series due 1986	40,000
4⅜% Series due 1988	35,000
4¾% Series due 1990	50,000
4¾% Series due 1991	30,000
4½% Series due 1993	30,000
4½% Series due 1995	35,000
5½% Series due 1996	30,000
5½% Series due 1997	40,000
7% Series due 1998	50,000
7⅜% Series due 1999	35,000
8¼% Series due 1999	40,000
9% Series due 2000	60,000
7⅞% Series due 2001	50,000
7⅝% Series due 2001	50,000
8⅛% Series due 2001	60,000
8⅜% Series due 2004	70,000
Unsecured bank notes (12.6%) due December 31, 1979—see note (b)	75,000
Missouri Environmental Improvement Revenue Bonds— Series 1974, interest rates averaging 6.21%, due 1989 to 2004	16,500
Total Union Electric Company	$851,500
Missouri Power & Light Company	
First mortgage bonds—see note (a)	
2¾% Series due 1976	7,500
2¾% Series due 1979	2,000
3¼% Series due 1984	7,500
4½% Series due 1992	6,000
10¾% Series due 1994	7,000
5⅛% Series due 1996	5,000
5⅛% Series due 1997	5,000
8% Series due 1999	5,000
7¾% Series due 2003	7,000
Unsecured note (8%) due in installments to 1976	43
Total Missouri Power & Light Company	$ 52,043
Missouri Edison Company	
First mortgage bonds—see note (a)	
5% Series C due 1991	2,000
4¾% Series D due 1995	3,000
Total Missouri Edison Company	$ 5,000

See Notes to Financial Statements.

UNION ELECTRIC COMPANY AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS (Continued)

(5) CAPITAL STOCK (Continued)

Preferred Stock Provisions

	Redemption Price Per Share	
	Current	Eventual Minimum
Union Electric Company		
$6.40 Series	$106.40(A)	$101.50
$4.56 Series	103.61(A)	102.47
$4.50 Series	110.00	110.00(B)
$4.00 Series	105.625	105.625
$3.70 Series	104.75	104.75
$3.50 Series	110.00	110.00
$8.00 Series	102.25(A)	93.25
$8.00 Series of 1971	107.50(A)	98.50
$7.44 Series	107.50(A)	101.00
$2.72 Series(C)	27.75(A)	25.25
Missouri Power & Light Company		
4.30% Series	102.176	102.176
3.90% Series	105.00	105.00
Missouri Utilities Company		
5.00% Series	110.00	110.00
5.00% Series of June 1950	103.50	103.50
5.00% Series of September 1950	103.50	103.50
5.70% Series(D)	104.50(A)	100.00

(A) Redemption subject to certain restrictions regarding refunding operations.

(B) In the event of voluntary liquidation, $105.50.

(C) Subject to a special redemption price currently of $25.89 and at increasing prices (to an eventual maximum of $29.07) thereafter through January 2, 1977.
Required to redeem 80,000 shares at $25 per share on November 15 of each year, commencing in 1979.

(D) Required to redeem 260 shares at $100 per share, plus accrued dividends, on June 1 of each year.

(6) DEBT RETIREMENT PROVISIONS

During the five years from December 31, 1974, $15,293,628 of long-term debt matures in 1975; $7,743,653 matures in 1976; $161,874 matures in 1977; $105,000 matures in 1978; and $79,605,000 matures in 1979, as follows: Union Electric Company's $13,000,000 of 2¾% Series first mortgage bonds mature October 1, 1975; Union Electric Company's $75,000,000 long-term, unsecured, 7¾% notes mature December 31, 1979; Missouri Edison Company's $1,650,000 of 3½% Series A and $350,000 of 4% Series B first mortgage bonds mature July 1, 1975; Missouri Power & Light Company's $7,500,000 and $2,000,000 of 2¾% Series first mortgage bonds mature July 1, 1976 and November 1, 1979, respectively; Missouri Power & Light Company's long-term, unsecured, 8% note matures in installments as follows: 1975—$43,537 and 1976—$43,538; Union

UNION ELECTRIC COMPANY AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS (Continued)

) Debt Retirement Provisions (Continued)

lliery Company's long-term, unsecured, 4¾ % note matures in installments as follows: 1975—$42,600 and 76—$42,600; Union Colliery Company's long-term, unsecured, 8% note matures in installments as follows: 75—$48,491, 1976—$52,515 and 1977—$56,874; Missouri Utilities Company's $500,000 of 3¼ % ries D, $1,000,000 of 3¼ % Series E, and $1,000,000 of 4% Series F first mortgage bonds mature June 1979; Missouri Utilities Company's long-term, unsecured, 6% note matures in installments as follows: 75—$105,000, 1976—$105,000, 1977—$105,000, 1978—$105,000 and 1979—$105,000; and Missouri ilities Company's long-term, unsecured, 7%, $54,000 note matures July 15, 1975.

ebt retirement provisions contained in the mortgage bond indentures of the Company and its subsidiaries quire, subject to certain alternatives, the redemption annually of 1% of the principal amount (as defined) each series of bonds. In lieu of such redemptions, the Company and its subsidiaries have been follow- the practice of utilizing property additions as permitted by the indentures.

) Retirement Plans

e retirement plans covering employees of the Company and its subsidiaries are financed through irrev- able pension trusts and group annuity contracts. The policy is to fund pension costs accrued. Costs of the irement plans for the years 1970, 1971, 1972, 1973 and 1974, were $4,963,000, $5,317,000, $6,589,000, ,179,000 and $7,870,000, respectively, of which approximately 25% was charged to construction and cumulated depreciation accounts. The aforementioned amounts include prior service costs which are ing amortized over twenty years. At December 31, 1974, the unfunded prior service costs are estimated be $31,000,000. The actuarially computed value of vested benefits exceeded the fund (valued at market) approximately $40,000,000. The Company does not anticipate that any significant additional pension sts will be incurred by reason of the Employee Retirement Income Security Act of 1974.

) Compensating Balances and Short-Term Borrowings

December 31, 1974, the Company and its subsidiaries had $60,975,000 of short-term bank loans bearing an erage interest rate of 10.48%. The Company had $57,400,000 of commercial paper at December 31, 1974 an average interest rate of 10.26%. The loans payable to banks represent short-term notes with various aturity dates generally not in excess of 270 days; commercial paper generally matures within 30 to 45 days. December 31, 1974, the Company and its subsidiaries had bank lines of credit aggregating $81,005,000, ich make available interim financing at the prime rate of interest. In support of such lines the Company s with the majority of its lending banks unwritten agreements to maintain average compensating balances uivalent to 10% of the line of credit for borrowing from the bank plus 10% of the borrowings outstanding, determined from the bank ledger records. At December 31, 1974, unused lines of credit aggregating 3,805,000 on a consolidated basis were available for additional short-term borrowings; in addition, Company had two commitments from banks of $20,000,000 and $10,000,000, of which the latter ount is to support commercial paper. The commitments expire at the earlier of 360 days from the initial wing or April 18, 1976 and April 30, 1976, respectively. For these commitments, the Company pays fees ich range from .5 of 1% to .5 of 1% plus 9% of the prime rate of interest on the unused portion of the mmitments (at December 31, 1974 short-term bank loans of $3,775,000 were not under line of credit rangements).

APPENDIX I

Union Electric Company's Announcement on April 11, 1978, of Maintenance Fund Deposit for Possible Use in Retiring Bonds (Plaintiffs' Exhibit A-2)

UNION ELECTRIC COMPANY
One Memorial Drive - St. Louis

April 11, 1978

Mailing Address:
P.O. Box 67
St. Louis, Mo. 63166

To the holders of Union Electric Company's
10-1/2 percent Series Mortgage Bonds:

On April 14, 1978 Union Electric will deposit approximately $50 million with our mortgage trustee for possible use in retiring part of our $70 million outstanding issue of 10-1/2 percent First Mortgage Bonds, which are due in 2005.

Our Mortgage Indenture requires annual trust increments in property or money to satisfy Maintenance and Improvement Funds, established under the Mortgage.

The Company plans to use the deposited cash to retire the 10-1/2 percent Bonds if market conditions warrant.

Bonds to be retired will be decided by lot and will be redeemed at 100 percent of their principal amount plus accrued interest to the redemption date. You will be notified at least 30 days in advance if any of your bonds are selected for redemption.

Sincerely,

/s/ M. T. Welshans,
Vice President.

APPENDIX J

Union Electric Company's Announcement on June 19, 1978, Cancelling Previously Announced Plan to Retire Bonds (Plaintiffs' Exhibit E-20)

From: Public Relations
Union Electric Co.
1901 Gratiot St.
St. Louis, MO 63166

For further information call:
Herman Leibovich
(314) 621-3222 Station 2172

FOR IMMEDIATE RELEASE June 19, 1978

Union Electric announced today that it is cancelling its previously-announced plans to retire about $50 Million of an outstanding issue of 10-1/2% First Mortgage Bonds. The Company said that it regretted the decision, which it described as necessary because a lawsuit brought by a holder of some of the bonds had effectively prohibited the intended redemption and retirement of the 10-1/2% Bonds. The Company said that if it had carried out its announced plans, its costs of operation would have been reduced by over $570,000 annually.

APPENDIX K

First Amended Complaint As Amended

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 80-0196-C(4)
JURY TRIAL DEMANDED

Harold Harris, Continental Casualty Company, and National Fire Insurance Company of Hartford, individually and as representatives of all of the holders of Union Electric Company, First Mortgage Bonds, 10½% Series due 2005, and their transferees,

Plaintiffs,

vs.

Union Electric Company, St. Louis Union Trust Company, Merrill Lynch, Pierce, Fenner & Smith, Incorporated, White, Weld & Co., Incorporated, Bache, Halsey, Stuart, Shields, Inc.,

Defendants.

FIRST AMENDED COMPLAINT

COUNT I
DECLARATORY AND EQUITABLE RELIEF

Come now Class Plaintiffs, individually and as representatives of and for and on behalf of and for the use and benefit of all of the members of that class persons, firms and corporations who constitute all of the holders of Union Electric Company, First Mortgage Bonds, 10½% Series due March 1, 2005, hereafter referred to as "Series 2005 Bonds," and their transferees, and for their Cause of Action against Defendants Union Electric and St. Louis Trust Company, state as follows:

1. As used in this First Amended Complaint and in each Count thereof, the following terms shall have the following meanings:

(a) "Series 2005 Bonds" or "The Securities" shall mean those Bonds issued by Union Electric Co. as First Mortgage Bonds, 10½% Series due March 1, 2005, and described in and referred to in that Supplemental Indenture dated March 1, 1975 between Union Electric Company as Grantor and St. Louis Union Trust Company as Trustee, and on file as a portion of the transcript in Case No. 18,299 before the Public Service Commission of Missouri; a copy of which Bond is attached hereto as Exhibit "A" and by this reference hereby made a part hereof.

(b) "Union Electric" shall mean the Union Electric Company, a Missouri corporation, with offices at 1901 Gratiot, St. Louis, Missouri, its affiliates, subsidiaries, and predecessors in interest, its officers, directors, agents, servants, consorts and employees.

(c) "St. Louis Union" or "Trustee" shall mean the St. Louis Union Trust Company, a Missouri corporation, with offices at 510 Locust Street, St. Louis, Missouri, and its officers, directors, agents, servants, consorts and employees.

(d) "Lehman Brothers" shall mean Lehman Brothers, Inc., a corporation, and any corporation which is a successor in interest to its assets or liabilities whether or not the said Lehman Brothers, Inc. may have ceased to exist by virtue of a merger, dissolution, corporate reorganization, or otherwise, and regardless of the correct corporate name under which said successor corporation is known; Lehman Brothers, Kuhn & Loeb, Inc., a corporation; and the officers, directors, agents, servants, consorts and employees thereof.

(e) "Defendant Underwriters" shall mean collectively, Merrill Lynch, Pierce, Fenner & Smith, Incorporated; Bache,

Halsey, Stuart, Shields, Inc.; and White Weld, Incorporated; and any corporation which is a successor in interest to the assets or liabilities thereof, whether or not said corporation may have ceased to exist by virtue of a merger, dissolution, corporate reorganization, or otherwise, and regardless of the correct corporate name under which said successor corporation is known; and the officers, directors, agents, servants, consorts and employees thereof.

(f) "Managing Underwriters" shall mean collectively the Defendant Underwriters and Lehman Brothers.

(g) "The Offering Underwriters" shall include Defendant Underwriters and all other underwriters listed in Schedule A to the Underwriting Agreement, dated as of March 19, 1975, a copy of which schedule is attached hereto and by this reference hereby made a part hereof.

(h) "Class Members" shall mean all persons, firms or corporations who are present holders of Series 2005 Bonds and their transferees.

(i) "The Act" shall mean the Securities Act of 1933, as amended, 15 USC 77a et seq. The "Trust Indenture Act" shall mean the Trust Indenture Act of 1939, as amended, 15 USC 77aaa et seq. "Rule 10b-5" shall mean S.E.C. Rule 10b-5, 17 CFR 240.10(b)-5.

(j) "Commission" shall mean the Securities and Exchange Commission.

(k) "Underwriter" shall mean a person, firm or corporation who has purchased a security from an issuing company with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking.

(l) "Registration Statement" and "Prospectus" shall have the meanings given to those terms in 15 USC Sec. 77b.

(m) "Composite Indenture" shall mean that Indenture of Mortgage and Deed of Trust dated as of June 15, 1937 between Union Electric and St. Louis Union and which was approved by the Public Service Commission of Missouri in Case No. 9362, as amended by the Supplemental Indenture dated May 1, 1941 between Union Electric and St. Louis Union and which was approved by the Public Service Commission of Missouri in Case No. 10050.

(n) "1975 Indenture" shall mean that Supplemental Indenture dated March 1, 1975 between Union Electric and St. Louis Union and which was approved by the Public Service Commission of Missouri in Case No. 18299.

(o) "Improvement Fund" shall mean the Improvement Fund for Series 2005 Bonds provided for in Article IV, Section 1, of the 1975 Indenture.

(p) "Maintenance Fund" shall mean the Maintenance Fund provided for in Article IV, Section 5, of the 1975 Indenture.

(q) "Class Plaintiffs" shall mean Harold Harris, Continental Casualty Company and National Fire Insurance Company of Hartford, individually and for and on behalf of, and as representatives of, all Class Members.

2. Plaintiff, Harold Harris, is now, and at all times hereinafter mentioned was, a resident of the County of St. Louis, Missouri; and, since the original issue thereof, has been the owner of Series 2005 Bonds aggregating $12,000.

3. Plaintiffs, Continental Casualty Company and National Fire Insurance Company of Hartford, are now, and at all times hereinafter mentioned were, corporations duly organized and existing according to law; and, since the original issue thereof, have been the owners of Series 2005 Bonds aggregating $4,000,000.00.

4. Defendant Union Electric Company is now, and at all times hereinafter mentioned was, a corporation duly organized

and existing according to the laws of the State of Missouri, with its principal place of business in the City of St. Louis, Missouri and qualified to do business in the States of Iowa and Illinois, and engaged in the business of an electric utility, primarily in an area covering eastern, southeastern and central portions of Missouri, portions of Illinois adjacent to St. Louis, Missouri and the southeastern portion of Iowa, and as such is subject to the rules and regulations of the Public Service Commission of Missouri and the Illinois Commerce Commission and the Federal Energy Commission (formerly the Federal Power Commission) with respect to the operation of its business and the issuance of securities and changes in its capital and debt structures.

Defendant St. Louis Trust Company is now, and at all times hereinafter mentioned was, a corporation duly organized and existing according to the laws of the State of Missouri, with its principal place of business in the City of St. Louis, Missouri, and qualified to do business in Missouri, Illinois and Iowa, and engaged in the general business of a corporate fiduciary, and, as such, the duly qualified and acting Trustee of a Trust created under the Composite Indenture wherein Defendant Union Electric is Grantor and Defendant St. Louis Union is Trustee, as amended and supplemented by various Supplemental Indentures including the 1975 Indenture.

6. This action arises under and is brought pursuant to various of the Securities Laws of the United States, namely, Section 10(b) of the Securities Exchange Act of 1934 (15 USC 78j) and Rule 10(b)-5 of the Securities and Exchange Commission (17 CFR 240.10(b)-5), Section 17(a) of the Securities Act of 1933 (15 USC 77q), and Section 323 (a) of the Trust Indenture Act of 1939 (15 USC 77www) and this Court has jurisdiction pursuant to the provisions of Section 27 of the Securities Exchange Act of 1934 (15 USC 78aa), Section 22 of the Securities Act of 1933 (15 USC 77v), and Section 322 of the Trust Indenture Act of 1939 (15 USC 77vvv).

7. There are presently issued and outstanding Series 2005 Bonds in the aggregate face principal amount of $70,000,000.00 and the total number of Class Members (being the present holders of said Bonds and their transferees) are so numerous that joinder of all of them as parties hereto is impracticable. The questions of law and fact involved in the Class Plaintiffs' claims are common to all of the Class Members, and the claims of Class Plaintiffs are typical and representative, and, to the best of Class Plaintiffs' knowledge, information and belief, theoretically identical to the claims of each of the Class Members, and Class Plaintiffs can and will fairly and adequately protect and represent the interest of each of the Class Members, and Class Plaintiffs are represented by qualified and experienced class action counsel, who will deligently pursue the claims of the Plaintiffs and members of the class.

8. The prosecution of separate actions by each Class Member would create a risk of inconsistent or varying adjudications with respect to each Class Member which would establish incompatible standards of conduct for the defendants and each of them and would create a risk of adjudication with respect to each Class Member which would, as a practical matter, either be dispositive of the interests of the other Class Members not a party to the adjudication and would, at the least, seriously impair and impede their ability to protect their interests.

9. The below described misrepresentations and omissions were unknown to holders of Union Electric's Series 2005 Bonds until April, 1978, at which point in time Union Electric issued a press release informing the public at large that it was contemplating redemption of the aforesaid bonds through the use of the Maintenance Fund and Improvement Fund. Prior to that time, Union Electric had maintained the deceptions more fully set forth below and, as late as March, 1978, open market purchases of the said Series 2005 Bonds were at prices which reflected the market understanding the bonds were not refundable until March 1, 1985, nor redeemable prior to that date

through the use of monies obtained directly or indirectly or in anticipation of borrowings at an effective interest cost of 10.60% per annum or less, and were redeemable prior to maturity only at the regular redemption prices hereinafter set forth. Since this action was filed during May, 1978, no Statute of Limitations is applicable to bar this action.

10. On or about March 19, 1975 Union Electric and Managing Underwriters entered into an underwriting agreement, pursuant to which Offering Underwriters, for whom Managing Underwriters acted as agents and representatives, purchased all of the Series 2005 Bonds issued by Union Electric, having an aggregate face value of $70,000,000.00, which purchase was made by the Offering Underwriters with a view to distribution and for the purposes of the resale of said Bonds to Plaintiffs and other members of the general public and Class Members pursuant to, in part, a Prospectus dated March 19, 1978, and conditioned upon the express warranties of Union Electric, among other things (of which said warranties the Class Plaintiffs and Class Members are third party beneficiaries) that:

(a) Union Electric had filed a Registration Statement with the Commission for the registration of the said Bonds under the Act;

(b) The Bonds would not be issued and sold unless a Registration Statement relating to said Bonds, and the registration of said Bonds, became effective;

(c) At the time the said Registration Statement became effective and at the time said Bonds were delivered to the Offering Underwriters that both the Registration Statement and the Prospectus, as then supplemented or amended, would comply with the provisions of the Act and Regulations and neither would contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements contained therein not misleading in the light of the circumstances in which they were made.

11. All of the Series 2005 Bonds were issued by Union Electric under the Composite Indenture as supplemented by various supplemental Indentures including the 1975 Indenture.

12. All of the Series 2005 Bonds were initially offered for sale to the Class Members and other members of the general public by the aforesaid Offering Underwriters by means of the March 19, 1975 Prospectus in which Union Electric and Defendant Underwriters, by virtue of their utilizing said Prospectus and offering said Bonds for sale to the general public and to the Class Members, and St. Louis Union by virtue of its being named in said Prospectus as Trustee with its consent to be so named, jointly and severally expressly warranted, covenanted and represented to each of the Class Members and to the general public by means of provisions contained in said Prospectus, that the Redemption Provision of the Series 2005 Bonds was that they were "Non-Refundable, otherwise than through the Improvement Fund or by the application of certain monies in the Maintenance Fund or otherwise in the Trust Estate, at a lower interest cost prior to March 1, 1985 and that "The New Bonds are redeemable, at the option of the Company, at the redemption prices set forth herein, provided that, prior to March 1, 1985, the Company may not redeem any of the New Bonds (other than through the Improvement Fund or by the application of certain monies in the Maintenance Fund or otherwise in the Trust Estate) from or in anticipation of funds borrowed having an interest cost to the Company of less than 10.60% per annum" and "that the New Bonds may not be so redeemed at the Regular Redemption Prices prior to March 1, 1985, if monies for such redemption are obtained by the Company directly or indirectly, from or in anticipation of borrowings by or for the account of the Company at an effective interest cost ...of 10.60% or less per annum."

13. In using the aforesaid language in the Prospectus, Defendants, and each of them, and Defendant Underwriter intended the purchasers of the Series 2005 Bonds to believe, and, at the

time of the issuance and sale of the Series 2005 Bonds, the purchasers of the Series 2005 Bonds, as well as the Defendants and the Offering Underwriters, intended and believed that the Series 2005 Bonds had a protection against lower interest cost refunding and that the Series 2005 Bonds could not be redeemed in any fashion prior to March 1, 1985 if the monies used for such redemption were obtained by the Company directly or indirectly, from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practices) of 10.60% or less per annum."

14. The aforesaid Series 2005 Bonds were sold and distributed to the Plaintiffs and members of their class by the use of the means of transportation or communications in interstate commerce, including, but not limited to, the use of the United States Mails.

15. The Prospectus provided that all regular redemptions of Bonds would be made at Regular Redemption prices set forth in the Prospectus, which prices, expressed as percentages of the principal amount of the Bonds were as follows:

If Redeemed During the 12 Month Period Beginning March 1	Regular Redemption Price
1975	110.50
1976	110.14
1977	109.78
1978	109.42
1979	109.06
1980	108.69
1981	108.33
1982	107.97
1983	107.61
1984	107.25
1985	106.88

16. Union Electric, on or about April 14, 1978, deposited $49,187,000.00 with St. Louis Union as Trustee for the Maintenance Fund to hold as part of the Trust Estate, and the sum of $700,000.00 with St. Louis Union as Trustee for the Improvement Fund. The monies utilized for such deposits were obtained by Union Electric through short term borrowings at an effective annual interest cost of less than 10.60%, and which borrowings were in violation of orders of the Federal Energy Commission (formerly the Federal Power Commission) dated June 30, 1977, and February 10, 1976, June 28, 1974, November 24, 1972, July 10, 1972, and February 9, 1970. At or about the time of such deposits, Union Electric announced publicly and to the Trustee its intention that Series 2005 Bonds in the principal amount of $9,887,000.00 would be specifically redeemed at par with such deposited funds. Thereafter Union Electric publicly announced that it had abandoned its intention to redeem the Bonds as a result of the institution of this action, and it withdrew the $49,147,000.00 Maintenance Fund Deposit from the trust estate. The $700,000.00 Improvement Fund deposit was not withdrawn. Union Electric has stated that, if the level of interest rates in the future and other circumstances make it advantageous, it intends to specially redeem all or part of Series 2005 Bonds at par utilizing cash deposited in the Maintenance Fund and obtained from borrowings at an interest rate of less than 10.60% per annum. Union Electric has demanded that St. Louis Union, as Trustee, tuilize the aforesaid $700,000.00 to redeem Series 2005 Bonds for the Improvement Fund and said Trustee has refused to do so without judicial authority.

17. The redemption scheme attempted by Union Electric, as set forth in paragraph 15 hereof, is permitted by the 1975 Indenture and the Composite Indenture and at no place in the Registration Statement or the Prospectus did Defendants disclose or Defendant Underwriter the fact that Union Electric could so use borrowed monies to redeem Series 2005 Bonds.

18. Rule 10b-5 is a duly promulgated rule of the Commission and is now, and at all times herein mentioned was, in full force

and effect as to all securities, sales and transactions falling within the purview of the jurisdiction of the Commission, including the Series 2005 Bonds, and provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means of instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

19. The Prospectus and Registration Statement were false and misleading, misstated material facts and failed to disclose material facts necessary in order to make the facts stated therein not misleading in the light of the circumstances under which they were made, in that:

(a) Defendants and Defendant Underwriters failed to disclose that there was nothing to prevent the redemption of the Bonds at any time after maturity through the Maintenance Fund or Improvement Fund with monies borrowed at an effective interest cost of less than 10.60% per annum.

(b) Defendants and Defendant Underwriters failed to disclose that the Series 2005 Bonds were refundable at a lower interest rate prior to March 1, 1985, and that Bond redemptions prior to maturity were not restricted to being out of operating revenues and would never be made at the Regular Redemption Prices.

(c) Defendants and Defendant Underwriters failed to disclose that Union Electric could redeem the bonds at any time at par without regard to the source of funds employed by using the Maintenance Fund and/or Improvement Fund as a bond sinking fund or debt retirement fund.

(d) Defendants and Defendant Underwriters failed to disclose that Union Electric could by-pass the general redemption provisions for purpose of refunding and redeeming the bonds at the lower special redemption price, through the use of the Maintenance Fund or Improvement Fund regardless of the source or cost of the funds so employed.

(e) Defendants and Defendant Underwriters failed to disclose that Union Electric could extend the cheaper special redemption price to redemptions for the Improvement Fund made with monies transferred from the Maintenance Fund, as well as redemptions made with monies paid into the Improvement Fund directly under the provisions of Section 1 of Article IV of the Indenture.

(f) Defendants and Defendant Underwriters failed to disclose that the 1975 Indenture and the Composite Indenture permits voluntary contributions, the use of funds other than those generated from operating revenues, and/or ability, by failing to utilize credits available to Union Electric, to increase cash contributions to the Maintenance Fund or Improvement Fund for the purpose of evading the Regular Redemption prices of the Series 2005 Bonds and the restrictions against redeeming said Bonds with monies obtained directly or indirectly or in anticipation of funds borrowed at less than 10.60% per annum.

(g) By including the premium price list (Regular Redemption Price) for Series 2005 Bonds in the Prospectus, the Defendants and Defendant Underwriters intended the purchasers and holders of Series 2005 Bonds to believe and mislead them to believe, that there were instances in which Union Electric would pay a premium price to redeem Series 2005 Bonds, and that Union Electric would pay the published premium price for any general or regular redemption of Bonds, when, in fact, there was no circumstance in which Union Electric would ever pay a premium price to redeem Series 2005 Bonds.

(h) Defendants and Defendant Underwriters failed to disclose at any place in the Registration Statement filed with the Commission, nor the Prospectus, or any amendments or supplements thereto, the applications for approval of the issue of Series 2005 Bonds filed with the Missouri Public Service Commission and the Illinois Commerce Commission, nor in the transcript of the proceedings held by the Missouri Public Service Commission or the Illinois Commerce Commission with respect to such applications, that there were any sinking funds or debt retirement funds in existence with respect to any bonded indebtedness of Union Electric, including Series 2005 Bonds, albeit, in fact, the Maintenance Fund could be used as a sinking fund and as a debt retirement fund.

(i) Defendants and Defendant Underwriters failed to disclose that the Series 2005 Bonds could be redeemed at par by the device of borrowing monies at a lesser rate of interest than 10.60%, and contributing said funds to the Maintenance Fund, and using such Maintenance Fund monies to redeem the Bonds under provisions in the Original Indenture at the special redemption price of 100%; nor that the Series 2005 Bonds could be redeemed at par by the device of borrowing monies at a lesser rate of interest than 10.60%, and contributing said funds to either or both the Maintenance Fund and Improvement Fund and redeeming the Bonds at the special redemption price of 100% directly in the Improvement Fund or Maintenance Fund; nor that the Series 2005 Bonds could be redeemed directly in the Maintenance Fund in any fashion; nor that any monies in the Maintenance Fund could be directed to any Improvement Fund for Bonds other than certain Improvement Funds for certain prior issues.

(j) Due to its historical means of compliance with the requirements of the Maintenance Fund, disclosed on page 44 of the Prospectus in Note 6 thereon; the disclosure in the Prospectus on page 15 that it had gross property additions during the five year period 1970-1974 of $863,226,792.00; the disclosure in

the Prospectus that the proceeds of the Bonds were to be used to finance the Company's construction program and that approximately $198,000,000.00, would be expended in 1975 in construction; that all of said property additions so accumulated and acquired through new construction, aggregating in excess of $1,060,000,000.00 were available to reduce any cash contributions which might otherwise be required to be made to the Maintenance Fund and/or Improvement Fund; each Prospectus implied and misled Plaintiffs and the Class Members to believe, that only small numbers of Bonds could be called but that none would be called for redemption through the Improvement Fund and that no Bonds could or would be called for redemption through the Maintenance Fund, when such was not true.

20. The statements, misstatements and omissions as set forth in paragraph 19 hereof are material facts necessary in order to make the statements contained in the Prospectus and Registration Statement, not misleading in the light of the circumstances under which they were made.

21. The utilization of the redemption device described in paragraph 16 hereof constitutes and would constitute the use of the mails and means and instrumentalities of interstate commerce by the Defendants and Defendant Underwriters - through the means of the Prospectus, Registration Statement, Composite Indenture, Series 2005 Bonds, and 1975 Indenture - to, in connection with the offer and/or sale of securities, make untrue statements of material facts in such documents and omit to state material facts necessary in order to make the statements made in such documents, in light of the circumstances under which they were made, not misleading; and to, in connection with the offer and/or sale of securities, obtain money or property by means of such untrue statements of material facts or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and to, in connection with the offer and/or sale of securities, employ devices, schemes and artifices to defraud

and to engage in acts, practices and courses of business which operate as a fraud or deceit upon persons of Plaintiffs' class, including the Class Plaintiffs and Class Members, in connection with the purchase or sale of securities, as a result of which, Class Plaintiffs and members of their class have been and will be damaged, and suffer irreparable harm as will be shown hereinafter; all in violation of Rule 10b-5, Section 17)a) of the Act and Section 323(a) of the Trust Indenture Act, in that:

(a) In order to sell the aforesaid bonds, under then prevailing market conditions, it was necessary for Union Electric to represent the bonds were non-refundable for ten years, with monies borrowed at an effective interest cost of 10.60% per annum when the opposite was true.

(b) In order to sell the aforesaid bonds, under then prevailing market conditions, it was necessary for Union Electric to represent the bonds were not redeemable prior to maturity except at the Regular Redemption prices, except for cash deposited in the Improvement Fund, which cash would not be deposited if credits provided for by the 1975 Indenture for reduction of such cash contributions were available to Union Electric, when the opposite was true.

(c) In order to sell the aforesaid bonds, under the market conditions then prevailing, the provisions of the Prospectus and Indentures and the financial statements contained in the Prospectus and Registration Statement were intended and calculated by Defendants and Defendant Underwriters to give, and did give, the appearance that the Series 2005 Bonds were not refundable at a lower interest rate until March 1, 1985; were redeemable prior to maturity only out of operating revenues and then at the Regular Redemption Prices; were not redeemable in the Improvement Fund because there were sufficient credits to offset any cash contributions that might otherwise be required; were not redeemable directly or indirectly through the Maintenance Fund because Union Electric was not capable of generating suf-

ficient cash through its operating revenues in order to redeem bonds; and any cash required to be deposited in the maintenance Fund after deducting all credits to which Union Electric was entitled under the 1975 Indenture was required to be transferred to the Improvement Funds for certain prior bond issues of Union Electric; when, in fact, the foregoing, separately and in combination, misrepresented the redemption provisions of the mortgage and omitted to state material facts, without which misrepresentations and omissions the Series 2005 Bonds could not have been sold under the market conditions then prevailing, and, as a result of which misrepresentations and omissions the Bonds intitally were sold and were subsequently traded at artifically higher prices than would have been the case had there been truthful and full disclosure.

(d) The net effect of the aforesaid provisions of the Prospectus and the 1975 Indenture and the Composite Indenture and of the established custom and usage and of the procedure of Union Electric in satisfying Maintenance and Improvement Fund requirements with property additions and other credits provided for in the Indenture, and a corresponding generally prevalent custom and usage in the electrical industry as a whole, together with the inability of Union Electric to generate cash balances in excess of $5,000,000.00 from its operations, was that the bonds were considered in the market place as being non-redeemable for ten years; when in fact, Union Electric could redeem Bonds in the maintenance Fund at any time using borrowed monies.

(e) The prominent inclusion of the regular redemption price schedule was designed to mislead the investors into believing that there were times when Union Electric would be required to pay a premium price to redeem Series 2005 Bonds, when, in fact, under no circumstances would Union Electric ever redeem bonds at a price other than the special redemption price of par due to the ability to effect redemptions through the Maintenance Fund and/or Improvement Fund without regard to the source of the funds so employed.

(f) The general or regular redemption price schedule was designed to mislead the investors into a false sense of security regarding protection of the bonds from call, and had no other purpose, in that the bonds could not have been called at the general or regular redemption price if interest rates fell, and would not have been called at the general redemption price had interest rates risen, and that there was, in fact, no circumstance under which bonds would ever be redeemed at the regular redemption price.

(g) Such a redemption device is a material fact and as such was not disclosed in the Prospectus or the Registration Statement, and the failure to make such disclosure made the statements contained in the Prospectus and the Registration Statement untrue and misleading as to the redemption prices, redemption rights, restrictions on the use of borrowed funds in redeeming Bonds, the source of contributions and nature of the Improvement Fund and the Maintenance Fund, the debt retirement provisions employed by the Company, and provided for under the Composite Indenture and 1975 Indenture.

(h) In the context of the Prospectus, no reasonable person could or would believe that Union Electric could or would redeem a material portion or all of the $70,000,000.00 issue of Series 2005 Bonds prior to maturity through the device of the Maintenance Fund.

(i) At the time of issuing the aforesaid Prospectus, Union Electric did not intend to be able to use the Maintenance Fund as a method of redeeming bonds and intended to and did represent to the Class Plaintiffs and members of their class, that the Bonds were essentially not redeemable prior to maturity except at the Regular Redemption Price and not refundable at a lower effective interest cost prior to March 1, 1985, and such intention and representation would be rendered false, and material facts concerning the ability to use the Maintenance Fund as a scheme for total or substantial redemption of bonds were omitted.

(j) Union Electric knew that the investment community read and understood the Prospectus as stating that the bonds were not redeemable prior to maturity except at the premium redemption prices, and so intended that it be so understood, and therefore the Defendants had actual knowledge that the redemption device rendered the Prospectus misleading and constituted a scheme or artifice to defraud the Bondholders and was a course of action, business and dealing which operated as a fraud and deceit upon Plaintiff and the Class Members;

(k) The Defendants and Defendant Underwriters through the Prospectus, would work a fraud on the marketplace, having artificially inflated the price of the Bonds, which fraud continued in its effects until April, 1978 when Union Electric revealed the information omitted from the Prospectus.

(l) The Prospectus and Registration Statement were false and misleading and misstated material facts and failed to disclose material facts necessary to make the statements contained therein not misleading in the light of the circumstances under which they were made, all as were fully set forth in paragraphs 19 and 20 hereof.

(m) The aforesaid redemption device is illegal and unlawful because the use by Union Electric of the proceeds of short term borrowings to satisfy mortgage contribution requirements to the Maintenance Fund or Investment Fund, or to redeem Bonds, violates the orders of the Federal Energy Commission (formerly Federal Power Commission), as more fully set forth in paragraph 16 hereof.

22. Plaintiffs state that the descriptions contained in the Prospectus and Registration Statement, the 1975 Supplemental Indenture, the Composite Indenture, and in the Bond Certificate and Bond Contract of the protection against refunding intended to be conferred thereby, of the ability to redeem Series 2005 Bonds at the special redemption price of par, are erroneous and do not, in fact, describe the protection against refunding, nor

the use of Maintenance Fund cash, nor the applicability of the special redemption price of par, intended by the parties.

(a) The protection against refunding intended by the parties was an absolute protection that "the Company (Union Electric Company) may not redeem any of the New bonds directly or indirectly from or in anticipation of funds borrowed by or for the account of the Company having an interest cost of less than 10.60% per annum prior to March 1, 1985." In order to make said Bond Certificate, 1975 Indenture, Composite Indenture and Bond Contract provide the protection against refunding that they were designed and intended to provide, said descriptions should be reformed by substituting the clause last quoted above for those contained and inserted in the Bond Certificate, Section 1 of Article III of the 1975 Indenture and in the Bond Contract by mistake.

(b) The parties intended that Maintenance Fund cash could never be used to redeem Bonds and that no Series 2005 Bonds could be redeemed at the special price of par except by using monies generated under the original mortgage by insured losses or eminent domain, and by the use of monies in the Improvement Fund paid into the Improvement Fund under the provisions of Section 1 of Article IV of the 1975 Indenture. In order to make said Bond Certificate, 1975 Indenture, Composite Indenture and Bond Contract provide for the use of Maintenance Fund cash and for the redemption of Bonds at the special redemption price of par as the parties intended to provide, the Bond Contract should be reformed to include the following provisions:

> (i) By inserting in Section 5 of Article IV of the 1975 Indenture after the last paragraph thereof, a new paragraph to read "No cash in the Maintenance Fund shall be used for the redemption of Bonds of for any other purpose than that specified in this Section 5 of this Article IV hereof. No provision of Article VIII of the Original Indenture, other

than those contained in Sections 1 and 3 thereof, shall apply to any asset of the Maintenance Fund."

(ii) By inserting in Section 3 of Article IV of the 1975 Indenture after the last sentence in the second paragraph thereof, a new sentence to read "The said special redemption price shall not apply to any redemptions of Bonds of 2005 Series where the monies for such redemptions are obtained by the Company directly or indirectly from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum."

(c) Plaintiffs further state that the language contained in the Bond Certificate, 1975 Indenture, Composite Indenture and Bond Contract setting forth the protection against refunding, the ability to redeem Series 2005 Bonds with Maintenance Fund cash, and the ability to redeem Series 2005 Bonds at the special redemption price of par, was incorrectly written by mistake, and did not express the mutual intent of the parties, and was received by all of the parties and by the plaintiffs under a mutual mistake of fact as to said matters, and that the suggested reformations contained in this paragraph 22 hereof correctly state the mutual intent and belief of the parties and of the plaintiffs at the time of issue of the bonds as to such matters afforded by the Bond documents and Bond Contract.

23. Although Defendants have temporarily cancelled the redemption plan referred to above, and Union Electric has withdrawn from the Trust Estate the sum of $49,187,000.00 Maintenance Fund Deposit, it desires to effectuate such a redemption plan in the future if circumstances make it advantageous to the Union Electric its overall financing, and its customers, and is insisting on the redemption of $700,000.00 in Series 2005 Bonds in the Improvement Fund; and therefore a mature and substantial controversy exists.

24. Defendants and each of them are estopped to avail themselves of the redemption device as aforesaid for the reasons set forth in paragraphs 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, and 21 hereof; and because Defendants by failing to disclose such device and other material facts in the Prospectus and Registration Statement placed the Class Members in a position whereby they would suffer irreparable damage by means of such a redemption device as aforesaid, and such Defendants cannot be permitted to derive benefits from their misstatements of material fact or from their failure to disclose in the Prospectus and Registration Statement such material facts necessary to make the statements contained therein not untrue or misleading, nor from conduct constituting violations of Rule 10b-5, Section 17(a) of The Act and Section 323(a) of the Trust Indenture Act.

25. If allowed to go unrestrained, Union Electric and St. Louis Union will proceed with the redemption of all Series 2005 Bonds at par value and would be allowed to derive personal profit and gain as a result of a violation of Rule 10b-5, The Act and of The Trust Indenture Act, as aforesaid, all of which is contrary to the expressed public policy of the United States of America as expressed therein.

26. If allowed to go unrestrained, Defendants and each of them will carry out and effectuate a refinancing at a rate of interest below 10.60% and redeem all of Series 2005 Bonds by the direct or indirect use of such borrowed money, or in anticipation thereof, and thus be permitted through the use of a device, as aforesaid, which, if permitted, would constitute the taking of advantage of a material fact which Defendants omitted to state in the Propspectus in direct violation of Rule 10b-5, Section 17(a) of The Act and of Section 323 (a) of The Trust Indenture Act to derive benefits from their own wrong-doing, as aforesaid, and to deprive the Class Members of their rights in interest income at rates of 2% to 2½% above prevailing market for a period of approximately 7½ years, or an aggregate lost in-

terest income to affected Class members whose Bonds are so redeemed of $6,342,000.00, being the difference between the Regular and Special Redemption Prices for a redemption in the calendar year 1979.

27. If allowed to go unrestrained, Defendants and each of them will carry out and effectuate a refinancing at a rate of interest below 10.60% and redeem all of Series 2005 Bonds by the direct or indirect use of such borrowed money, or in anticipation thereof, and thus be permitted through the use of device, as aforesaid, which, if permitted would constitute the taking advantage of a material fact which Defendants omitted to state in the Prospectus in direct violation of Rule 10b-5, Section 323(a) of The Trust Indenture Act and Section 17(a) of the Act, to derive benefits from their own wrong-doing, as aforesaid, and to deprive the Class Members of their rights to interest income at rates of 2% to 2½% above prevailing market for a period of approximately 7½ years, or an aggregate lost interest income to effected Class Members whose Bonds are so redeemed of $13,125,000.00, and to deprive Class Members whose Bonds are so redeemed of $6,342,000.00, being the difference between the Regular and Special Redemption Prices for a redemption in the calendar year 1979.

28. If allowed to go unrestrained, Defendants by such unlawful and illegal actions will have been able and will continue to be able to depress the market value of Series 2005 Bonds on the new York Stock Exchange by approximately 13 percentage points, thereby depriving the Class Members of $9,100,000.00 in value of their said Bonds.

29. If allowed to go unrestrained, Union Electric and St. Louis Union will proceed with the redemption of all Series 2005 Bonds at par value and the Class Members will suffer irreparable harm and injury in that those Class Members whose Bonds are redeemed will be deprived of income producing assets, lose income in the aggregate approximate amount of

$13,125,000.00 and be deprived of $6,342,000.00 of redemption monies, or due to the uncertainty in the market caused by Union Electric's claim to be able to redeem the Bonds at any time at par, Class Members whose Bonds are not redeemed will be deprived of redemption monies in the future as well as diminution in value of their said Bonds in the aggregate sum for all Class Members of $9,100,000.00, all to the collective damage of the Class Members in a sum as great as $19,467,000.00

30. Class Plaintiffs pray the Court to make and enter its order, judgment and decree against Defendants Union Electric and St. Louis Union:

A. Declaring and adjudging that Class Plaintiffs may maintain this action as a class action for and on behalf of, and for the use and benefit of Class Members; and

B. Declaring and adjudging that Defendants failed to disclose in any Prospectus or Registration Statement:

1. That Series 2005 Bonds could be redeemed at par at any time, directly or indirectly, or in anticipation of borrowed monies obtained at an effective interest cost of 10.60% per annum or less; and

2. That Series 2005 Bonds could be redeemed at par in the Maintenance Fund at any time; and

3. That Series 2005 Bonds were subject to the use by Defendants of the Maintenance Fund as a sinking fund or Debt Retirement Fund or subject to the use of the Maintenance Fund and other Improvement funds for Bonds of other series as "Funnel Sinking" Funds; and

4. That under no circumstances would Defendants be required to ever redeem Series 2005 Bonds at the Regular Redemption Prices and that said Bonds could be redeemed at any time at par without regard to the source of funds employed; and

5. That Defendants could circumvent all call or refunding restrictions as to Series 2005 Bonds and the Regular Redemption Prices by merely causing the Bonds to be redeemed through the Maintenance Fund or Improvement Fund provided for in the Composite Indenture as supplemented; and

6. That Union Electric could or would make cash contributions to the Maintenance Fund and/or Improvement Fund prior to March 1, 1985 when it had available to it credits for property additions under the 1975 Indenture; and

7. That Union Electric could or would make cash contributions to the Maintenance Fund and/or any Improvement Fund for Bonds other than from the monies generated from the operating revenues of the Union Electric; and

8. That Defendants could or would redeem Series 2005 Bonds prior to maturity at other than Regular Redemption Prices; and

9. That Defendants could or would attempt to refund Series 2005 Bonds prior to March 1, 1985 at a lower effective rate of interest; and

10. That no call or refunding restrictions otherwise applicable to Series 2005 Bonds were applicable to redemption of such bonds if made through or for any Maintenance Fund or Improvement Fund for Bonds; and

11. That monies could be withdrawn from the trust estate for the purpose of redeeming bonds at par prior to maturity; and

C. Declaring and adjudging that all of the facts set forth in paragraph B hereof are material facts required to be stated in any Prospectus or Registration Statement pertaining to Series 2005 Bonds and are necessary in order to make the statements contained in such documents not misleading in light of the circumstances in which they were made; and

D. Declaring and adjudging that the Prospectus and Registration Statement are misleading in that the Prospectus and Registration Statement:

1. Fail to disclose material facts necessary in order to make the statements contained in such documents not misleading; and

2. Falsely states that Union Electric may not redeem any of the Series 2005 Bonds directly or indirectly from or in anticipation of funds borrowed by or for the account of the Company having an interest and cost of less than 10.60% per annum prior to March 1, 1985; and

3. Implies, by the inclusion of a premium price list for general redemption of bonds, denominated as the "Regular Redemption Prices," that such premium prices would be paid for any regular or general redemption of Bonds prior to maturity when, in fact, there was no circumstance when Defendant Union Electric would ever pay a Regular Redemption Price for Bonds; and

4. In denominating the price lists for bond redemptions as "Special Redemption Prices" and "Regular Redemption Prices," in the manner in which they did, misstated the prices which would in fact be applied to any general or regular redemption of Bonds and to any special or extraordinary redemption of Bonds; and

5. By referring to a call protection against Bond redemption prior to March 1, 1985 when in fact the bonds could be redeemed with such borrowed monies in the Maintenance Fund at the lower "Special Redemption Price" prior to March 1, 1985, misled the Bondholders into believing they had some protection against call or against lower interest cost refunding when in fact they had no protection against redemption of the Bonds at all; and

E. Declaring and adjudging that Defendants, and each of them, by attempting and publicly announcing the intention to attempt or effect, a redemption of Series 2005 Bonds at par through the Maintenance Fund and/or Improvement Fund for Series 2005 Bonds using monies obtained through or in anticipation of borrowings at an effective annual interest cost of

10.60% per annum or less, have caused the provisions in the Prospectus and Registration Statement with respect to the redemption and call features of Series 2005 Bonds and the deposit, use or withdrawal of monies in the trust estate to be false and misleading with respect to the redemption and call features of Series 2005 Bonds and that such features are material facts; and that Defendants so knew; and

F. Declaring and adjudging that Defendants in reliance on all of the statements contained in and on the omissions of all of the aforesaid statements omitted from the Prospectus, and Registration Statement pertaining to Series 2005 Bonds, sold, or caused to be sold, by means of transportation or communications in interstate commerce, including the use of the United States mail, all of the Series 2005 Bonds to the Class Members and their privies and that the Class Members and their privies so relied in purchasing Series 2005 Bonds; and

G. Declaring and adjudging that the omission of said items from the Prospectus, and Registration Statement pertaining to Series 2005 Bonds, and the attempt to effect, or public announcement of any intention to attempt or effect, a redemption of Series 2005 Bonds as described in paragraph E hereof, constitute violations of Rule 10b-5, Section 323(a) of the Trust Indenture Act of 1939 and of Section 17(a) of the Securities Act of 1933; and

H. Declaring and adjudging that Union Electric is prohibited by the orders of the Federal Energy Commission (formerly the Federal Power Commission) dated February 10, 1976, June 20, 1977, June 28, 1974, November 24, 1972, July 10, 1972 and February 9, 1970 from using any of the proceeds of short term borrowings to satisfy mortgage requirements for contributions to the Maintenance Fund or Improvement Fund under the Composite Indenture, as supplemented, or to redeem Series 2005 Bonds; and

I. Declaring and adjudging that Union Electric or St. Louis Union are estopped to redeem any Series 2005 Bonds prior to March 1, 1985 if the monies for such redemptions are obtained by the Union Electric, directly or indirectly, from or in anticipation of borrowings by or for the account of Union Electric, the Improvement Fund, or the Maintenance Fund, at an effective interest cost (computed in accordance with generally accepted financial practices) of 10.60% per annum, or less; and

J. Declaring and adjudging that the Defendants are estopped to redeem any Series 2005 Bonds at the Special Redemption price of par (100% of the true amount of such Bonds) except that Series 2005 Bonds which are redeemed by or for the Improvement Fund with monies paid directly into the Improvement Fund by Union Electric in a sum computed in accordance with Section 1 of Article IV of the Indenture, when no credits were available to Union Electric to reduce such sums, may be redeemed at the said Special Redemption Price set forth in SEction 3 of Article I of the 1975 Indenture and set forth on the reverse side of each Series 2005 Bond, provided that not more than $700,000.00 principal amount of Series 2005 Bonds shall be redeemed at the Special Redemption Price in any one year; and

K. Declaring and adjudging that it was mutually intended by the parties that the redemption features of the Series 2005 Bonds contain provisions that under no circumstances was Union Electric to be able to redeem any of the Series 2005 Bonds prior to March 1, 1085, where monies for such redemption are obtained directly or indirectly from or in anticipation of borrowings by or for the account of Union Electric at an interest cost of 10.60% or less per annum, and that the provision in the Bond Contract permitting the redemption of Bonds in the Maintenance Fund and the use of borrowed monies to redeem Bonds in the Maintenance fund or in the Trust Estate under the Composite Indenture, as supplemented, is a mutual mistake of fact and was never intended by any of the parties and is

specifically contrary to the intention and belief of all of the parties that no Series 2005 Bonds could be redeemed, as aforesaid, prior to March 1, 1985; and

L. Reforming the Bond Contract so as to provide that under no circumstances can any Series 2005 Bond be redeemed prior to March 1, 1985 where the monies for such redemption are obtained by Union Electric directly or indirectly from or in anticipation of borrowings by or for the account of Union Electric at an interest cost of 10.60% or less per annum; and

M. Reforming the Bond Contract so as to provide in Section 5 of Article IV of the 1975 Indenture after the last paragraph thereof, a new paragraph to read "No cash in the Maintenance Fund shall be used for the redemption of Bonds of for any other purpose than that specified in this Section 5 of this Article IV hereof. No provision of Article VIII of the Original Indenture, other than those contained in Sections 1 and 3 thereof, shall apply to any asset of the Maintenance Fund"; and

N. Reforming the Bond Contract so as to provide in Section 3 of Article IV of the 1975 Indenture after the last sentence in the second paragraph thereof, a new sentence to read "The said special redemption price shall not apply to any redemptions of Bonds of 2005 Series where the monies for such redemptions are obtained by the Company directly or indirectly from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum"; and

O. Permanently enjoining, restraining and prohibiting Defendants and each of them, individually or in consort with or by and through their officers, directors, agents, attorneys, servants, consorts and employees from:

1. Prior to March 1, 1985 buying, selling, alienating, hypothecating, acquiring, redeeming or entering into any other

transaction with respect to any Series 2005 Bond, or interest therein, by which Union Electric or St. Louis Union, directly or indirectly, acquire any interest in such Bond or reduce or extinguish, in whole or in part, the indebtedness of Union Electric, under, or by virtue of, any Series 2005 Bond, wherein the cash or thing of value employed in such transaction is obtained by Union Electric or St. Louis Union, directly or indirectly, or in anticipation of funds borrowed at an interest cost of 10.60% per annum or less; and

2. Soliciting, offering, lending, borrowing, acting as a broker or dealer, issuer, underwriter, purchaser or seller, or in any way taking any action with respect to the making or obtaining of any loan, obtaining of any funds (other than through regular operating revenues derived from Union Electric in the ordinary and regular course of its business), or issuance or sale of any security (as that term is defined in 15 USC 77b) for the purpose, stated or unstated, specific or reasonably implied, direct or indirect, of providing cash or other thing of value to be used directly or indirectly, or in anticipation of, such cash or other thing of value, in order to redeem in whole or in part any Series 2005 Bonds; and

3. Expressing, orally or in writing, or communicating in any way to any Class Member or any member of the general public any intention, plan, scheme, device, effort, undertaking, matter or thing, or action whatsoever with respect to the redemption in whole or in part, of any Series 2005 Bonds, wherein the cash or other thing of value for such redemption is obtained by Union Electric, St. Louis Union or any of the Offering Underwriters, directly or indirectly, for, or in anticipation of, borrowings by or for the account of Union Electric or St. Louis Union, in its capacity of Trustee under the Original Indenture as amended and supplemented, at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum, prior to March 1, 1985; and

4. Redeeming or attempting to redeem, or aiding, abetting, assisting or participating in any redemption of any Series 2005 Bonds at a redemption price other than the Regular Redemption Price set forth on the reverse side of each Series 2005 Bond and in Section 3, Article I of the Indenture, except for Bonds redeemed for the Improvement Fund in an amount not to exceed $700,000.00 in any one calendar year, and only then if redeemed with cash funds in an amount computed after utilizing and deducting from the contributions otherwise required all credits and deductions available to Union Electric as described in or provided by Article V of the 1975 Indenture, and which are, as so computed, contributed directly to the Improvement Fund for Series 2005 Bonds by Union Electric from its operating revenues under the provisions of Section 1, Article III of the Indenture; and

5. Purchasing or dealing in any Series 2005 Bond by or for or on behalf of, or the use and benefit of the account of Union Electric, St. Louis Union, as Trustee, the Improvement Fund or the Maintenance Fund, in the open market, in any private or public sale, or in any transaction for the Transfer of registration of any Series 2005 Bond; and

6. Withdrawing any monies from the Maintenance Fund on the Trust Estate under the Original Indenture as supplemented by the Indenture and 1941 Indenture for the purpose of redeeming said Series 2005 Bonds prior to maturity; and

P. Entering judgment in favor of the Class Plaintiffs and the Class Members for their reasonable attorney's fees and costs and expenses of suit herein expended.

COUNT II

DAMAGES - STATUTORY FRAUD

Come now Class Plaintiffs, individually and as representatives of, and for and on behalf of all the members of that class

of persons, firms, and corporations who constitute all of the holders of Union Electric Company, First Mortgage Bonds, 10½% Series due March 1, 2005, hereafter referred to as "Series 2005 Bonds," and their transferees, and for their Cause of Action against Union Electric and Defendant Underwriters, jointly and severally, pursuant to Rule 10b-5, Section 17(a) of The Act and Section 323(a) of the Trust Indenture Act, state as follows:

1. Plaintiffs restate each and every allegation contained in paragraphs 1 through 23 inclusive, of Count I hereof, and incorporate the same herein by reference as though more fully set forth herein.

2. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. is now, and at all times hereinafter mentioned was, a corporation duly organized and existing according to law, and references thereto shall include and also mean any corporation which is a successor in interest to its assets or liabilities, whether or not the said Merrill Lynch, Pierce, Fenner & Smith, Inc. may have ceased to exist by virture of merger, dissolution, corporate reorganization or otherwise, and regardless of the correct corporate name under which said successor corporation is known, and Merrill Lynch White Weld Capital Markets Group.

3. Defendant Bache, Halsey, Stuart, Shields, Inc., is now, and at all times hereinafter mentioned was, a corporation duly organized and existing according to law, and references thereto shall include and also mean any corporation which is a successor in interest to its assets or liabilities, whether or not the said Bache, Halsey, Stuart, Shields, Inc. may have ceased to exist by virture of a merger, dissolution, corporate reorganization or otherwise, and regardless of the correct corporate name under which said successor corporation is known, and Bache Group, Inc.

4. Defendant White Weld & Co., Inc., is now, and at all times hereinafter mentioned was, a corporation duly organized and

existing according to law, and references thereto shall include and also mean any corporation which is a successor in interest to its assets or liabilities, whether or not the said White Weld & Co., Inc., may have ceased to exist by virtue of a merger, dissolution, corporate reorganization or otherwise, and regardless of the correct corporate name under which said successor corporation is known, and Merrill Lynch White Weld Capital Markets Group.

5. As a direct and proximate result of the aforesaid fraudulent statements of untrue and misleading facts in the Prospectus and Registration Statement, and omissions to state facts necessary in order to make the statements contained in the Prospectus and Registration Statement not misleading, and of the aforesaid devices, schemes and artifices to defraud, and the aforesaid acts, practices and courses of business which operate as a fraud and deceit upon the Plaintiffs and Class Members, the Class Plaintiffs and the Class Members have been damaged in that they have been deprived of Bond redemption prices in the aggregate sum of $6,342,000.00, and suffered diminution in value of Series 2005 Bonds in the aggregate sum of $9,100,000.00, and depsrived of lost income, earnings and profits in the aggregate sum of $13,125,000.00, all to their damage in the sum of $22,225,000.00, and their attorney's fees and costs herein expended.

6. The aforesaid actions of Defendants and each of them, were willful, wanton, unlawful, illegal, malicious, and in reckless disregard of the rights of the Class Plaintiffs and Class Members, and the Class Plaintiffs and Class Members are therefore entitled to recover punitive damages.

7. Plaintiffs demand a trial by jury.

WHEREFORE, Class Plaintiffs and the Class Members pray judgment against the Defendants and each of them, and in favor of Class Plaintiffs and the Class Members in the sum of $22,225,000.00 actual damages and $35,225,000.00 punitive

damages for a total of $57,225,000.00 damages, and for their costs and expenses herein expended including reasonable attorney's fees.

COUNT III

FRAUD AND DECEIT

Come now Class Plaintiffs, individually and as representatives of, and for and on behalf of all the members of that class persons, firms, and corporations who constitute all of the holders of Union Electric Company, First Mortgage Bonds, 10½% Series due March 1, 2005, hereafter referred to as "Series 2005 Bonds," and their transferees, and for their Cause of Action against Union Electric and Defendant Underwriters, jointly and severally, state as follows:

1. Plaintiffs restate each and every allegation contained in paragraphs 1 through 23 inclusive of Counts I, and paragraphs 2, 3, and 4 of Count II, and incorporate the same herein by reference as though more fully set forth herein.

2. The aforesaid representations, covenants and warranties made by Defendants and each of them, were false when made and Defendants and each of them knew or by the exercise of ordinary care should have known, such representations, covenants and warranties to be false when made, but the Defendants and each of them made such representations, covenants and warranties without regard to the truthfulness and accuracy thereof, and in disregard of whether said representations, covenants and warranties were in fact true and not misleading or not; and Defendants and each of them made the aforesaid untrue and misleading statements in the Underwriters Agreement, Prospectus and Registration Statement and failed to disclose in said documents the aforesaid material facts necessary to make the statements contained in the said documents not misleading; and all of said misrepresentations and omissions of stated facts were material; and defendants and each of them in-

tended Class Plaintiffs and the Class Members to rely on said documents as being fully factually accurate, true and not misleading and not omitting or failing to disclose any fact necessary to render the statements contained in the said documents not misleading and that Class Plaintiffs and the Class Members had a right to so rely on such matters and did so rely on such matters.

3. As a direct and proximate result of the aforesaid fraudulent statements of untrue and misleading facts in the Underwriters Agreement, Prospectus and Registration Statement, and omission to state facts necessary in order to make the statements contained in said documents not misleading, the Class Plaintiffs and the Class Members have been damaged in that they have been deprived of Bond redemption prices in the aggregate sum of $6,342,000.090, or diminution in value of Series 2005 Bonds in the aggregate sum of $9,100,000.00, and deprived of lost income, earnings and profits in the aggregate sum of $13,125,000.00, all to their damage in the sum of $22,225,000.009, and their attorney's fees and costs herein expended.

4. The aforesaid actions of Defendants and each of them, were willful, wanton, unlawful, illegal, malicious, and in reckless disregard of the rights of the Class Plaintiffs and Class members, and the Class Plaintiffs and Class Members are therefore entitled to recover punitive damages.

5. Plaintiffs demand a trial by jury.

WHEREFORE, Class Plaintiffs and the Class Members pray judgment against the Defendants and each of them, and in favor of Class Plaintiffs and the Class Members in the sum of $22,225,000.00 actual damages and $35,000,000.00 punitive damages for a total of $57,225,000.00 damages, and for their costs and expenses herein expended including reasonable attorney's fees.

COUNTY IV

BREACH OF WARRANTY

Come now Class Plaintiffs, individually and as representatives of, and for and on behalf of all the members of that class of persons, firms, and corporations who constitute all of the holders of Union Electric Company, First Mortgage Bonds, 10½% Series due March 1, 2005, hereafter referred to as "Series 2005 Bonds," and their transferees, and for their Cause of Action against Union Electric and Defendant Underwriters, jointly and severally, state as follows:

1. Plaintiffs restate each and every allegation contained in paragraphs 1 through 23 inclusive of Count I hereof, and paragraphs 2, 3, and 4 of Count II, and incorporate the same herein by reference as though more fully set forth herein.

2. By failing to disclose anything to the contrary in the Prospectus and Registration Statement, Defendants expressly warranted and impliedly warranted to the Class Plaintiffs and their privies and all Class Members that:

(a) The bonds were non-refundable for ten years with monies borrowed at an effective interest cost of 10.60% per annum.

(b) The bonds were not redeemable prior to maturity except at the Regular Redemption Prices, except for cash deposited in the Improvement Fund, which cash would not be deposited if credits provided for by the 1975 Indenture for reduction of such cash contributions were available to Union Electric.

(c) The Series 2005 Bonds were not refundable at a lower interest rate until March 1, 1985; were redeemable prior to maturity only out of operating revenues and then at the Regular Redemption Prices; were not redeemable in the Improvement Fund because there were sufficient credits to offset any cash contributions that might otherwise be required; were not redeemable directly or indirectly through the Maintenance Fund

because the Union Electric was not capable of generating sufficient cash through its operating revenues in order to redeem bonds and any cash required to be deposited in the Maintenance Fund after deducting all credits to which Union Electric was entitled under the 1975 Indenture was required to be transferred to Improvement Funds for certain prior bond issues of Union Electric.

(d) The net effect of the aforesaid provisions of the Prospectus and the 1975 Indenture and of the established custom, usage and procedure of Union Electric in satisfying Maintenance and Improvement Fund requirements with property additions and other credits provided for in the Indentures, together with the inability to generate cash balances in excess of $5,000,000.00 from its operations, was that the bonds were considered in the market, and so warranted by Defendants, as being non-redeemable for ten years.

(e) That the Union Electric could not by-pass the general redemption provisions for purposes of refunding and redeeming the bonds at the lower special redemption price, through the use of the Maintenance Fund or Improvement Fund regardless of the source or cost of the funds so employed.

(g) Union Electric cannot extend the cheaper special redemption price to redemptions for the Improvement Fund made with monies transferred from the Maintenance Fund, as well as redemptions made with monies paid into the Improvement Fund directly under the provisions of Section 1 of Article IV of the Indenture.

(h) The Indenture does not permit voluntary contributions or the use of funds other than those generated from operating revenues, and/or ability, by failing to utilize credits available to Union Electric, to increase cash contributions to the Maintenance Fund or Improvement Fund for the purpose of evading the Regular Redemption prices of the Series 2005 Bonds and the restrictions against redeeming said Bonds with monies

obtained directly or indirectly or in anticipation of funds borrowed at less than 10.60% per annum.

(i) Union Electric could not and would not redeem a material portion of any of the $70,000,000.00 issue of Series 2005 Bonds prior to maturity through the device of the Maintenance Fund.

(j) Union Electric did not intend to be able to nor would it use the Maintenance Fund as a method of redeeming Bonds and intended to and did represent to the Class Plaintiffs and members of their class, that the Bonds were essentially not redeemable prior to maturity, except at the Regular Redemption Price, and not refundable at a lower effective interest cost prior to March 1, 1985.

(k) Due to its historical means of compliance with the requirements of the Maintenance Fund, disclosed on page 44 of the Prospectus in Note 6 thereon; the disclosure in the Prospectus on page 15 that it had gross property additions during the five year period 1970-1974 of $863,226,792.00; the disclosure in the Prospectus that the proceeds of the Bonds were to be used to finance the Company's construction program and that approximately $198,000,000.00, would be expended on 1975 in construction; that all of said property additions so accumulated and acquired through new construction, aggregating in excess of $1,060,000,000.00 were available to reduce any cash contributions which might have otherwise been required to be made to the Maintenance Fund and/or Improvement Fund; each Prospectus implied that only small numbers of Bonds could be called but that none would be called for redemption through the Improvement Fund and that no Bonds could or would be called for redemption through the Maintenance Fund.

3. Defendants expressly warranted to Plaintiffs that all statements contained in the Prospectus and Registration Statement were true, that there were no misstatements of material fact contained therein, and that there had been no omission to state therein any material fact necessary in order to make those

facts stated therein not misleading in the light of the circumstances under which they were made.

4. As a direct and proximate result of the aforesaid breaches of warranty of Defendants, and each of them, and the actions of Defendant Union Electric in publicly expressing its intention to redeem Series 2005 Bonds, as aforesaid, Class Plaintiffs and the Class Members have been damaged in that the fair market value of the Series 2005 Bonds outstanding has been diminished in the aggregate sum of $9,100,000.00 and they have been required to expend and incur attorney's fees and cost and expenses of suit.

5. Plaintiffs demand a trial by jury.

WHEREFORE, Class Plaintiffs pray judgment against the Defendants and each of them, and in favor of Class Plaintiffs and the Class Members in the sum of $9,100,000.00 and for their costs and expenses herein expended including a reasonable attorney's fee.

CAMPBELL & RADLOFF, P.C.

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(314) 991-0241

Attorneys for Class Action Plaintiffs

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818 Olive Street
St. Louis, Missouri 63101
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Co-Counsel

Copies of the above and foreging Second Amended Petition were served upon the attorneys for each of the Defendants at their addresses as reflected in the Pleadings on file herein by personally delivering a copy of same to each attorney, or by depositing a copy of same in the United States mail, postage prepaid, addressed to said attorneys at their addresses as disclosed on the Pleadings filed herein, which said service was effected on the 27th day of January, 1982.

David L. Campbell, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-0196C(4)

July 12, 1982

Harold Harris, et al.,
Plaintiffs,

v.

Union Electric Company, et al.,
Defendants.

AMENDMENT TO FIRST AMENDED COMPLAINT

By leave, Plaintiff hereby amend their First Amended Complaint by Interlineation by inserting the following:

"31. Defendants, at the time of the utilization of the redemption device described in paragraph 16, hereof, knew that said redemption device was contrary to, and prohibited by, the terms of the Prospectus and Registration Statement and the 1975 Indenture and, as such, said redemption device constitutes a scheme and artifice to defraud the Plaintiffs and Class Members, as more fully set forth in paragraph 21, hereof, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10(b)-5 of the Securities and Exchange Commission, Section 17(a) of the Securities Act of 1933, and Section 323(a) of the Trust Indenture Act of 1939."

CAMPBELL & RADLOFF, P.C.

By David L. Campbell, MBE #17926
10411 Clayton Road, Suite 304
St. Louis, Missouri 63131-2997
(314) 991-0241

Attorneys for Class Plaintiffs

So Ordered

PROOF OF SERVICE

The undersigned certifies that a complete copy of this instrument was served upon the attorneys of record of each party to the above action by enclosing the same in envelopes addressed to said attorneys at their business address as disclosed in the pleading of record herein, with first class postage fully prepaid, and by depositing said envelope in a U.S. post-office mail box in St. Louis, Missouri on this 7th day of July, 1982.

APPENDIX L

Liability Instructions

Nos. 9, 13, 15, 17, 18, 18A, 21A, 22

INSTRUCTION NUMBER 9

As you were advised at the beginning of the trial, in a companion state court proceeding the Missouri Court of Appeals has construed the provisions of the Bond Indentures, holding that Union Electric had a contractual right under the Bond Indentures to redeem the Bonds in the manner it attempted in April 1978. The Missouri Court of Appeals did not rule on any of the federal securities laws issues which are to be presented in this case.

INSTRUCTION NUMBER 13

In order to recover on his 10b-5 claim, the plaintiff must establish five elements, as follows:

First: That the defendant used the mails, or an instrumentality of interstate commerce, or a facility of a national securities exchange, in connection with the sale of securities;

Second: That in connection with such sale, the defendant, in the manner set out in the complaint, either

(a) employed a device, scheme, or artifice to defraud, or

(b) Made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) Engaged in an act, practice or course of business which operated as a fraud or deceit upon any person in connection with the purchase of a security.

Third: That the defendant acted knowingly, as that term is defined in these instructions;

Fourth: That the plaintiffs relied on statements of defendant found to be in violation of Rule 10b-5 in making the purchase of securities;

Fifth: That the plaintiffs suffered damages as a result.

It is not necessary for you to determine the nature and extent of plaintiffs' damages, if any, in this case. All that is necessary is to determine, in a general sense, whether or not the plaintiffs have sustained some damage.

INSTRUCTION NUMBER 15

You must answer questions concerning liability only with respect to plaintiffs' statutory fraud claims.

While you are to consider in a general sense whether or not plaintiffs have been damaged, you are not to concern yourselves with trying to ascertain the nature and extent of those damages or trying to ascertain or fix their amount. Any question as to the amount of plaintiffs' damages, if any, is not a question for you to consider or decide.

INSTRUCTION NUMBER 17

The plaintiffs also have the burden of proving what is called "reliance" upon the claimed misrepresentations of defendant. Reliance by the plaintiffs must have been justifiable and must have been reasonable under the circumstances. Ordinarily, representations which would seem to be immaterial do not justify reliance.

In relying on representations, the words used by a defendant may be taken in their ordinary natural meaning.

There is reliance by a plaintiff if that plaintiff would have been influenced to act differently than he had acted absent a defendant's misrepresentation or omission.

INSTRUCTION NUMBER 18

The plaintiffs, in order to recover on the 10b-5 claim, must show that the defendant acted knowingly, that is, with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element the plaintiffs must prove by preponderance of the evidence that the defendant stated material facts which it knew to be false, or knew of the existence of material facts which were not disclosed and should have realized their significance in the making of an investment decision.

INSTRUCTION NUMBER 18A

A person who acts in reckless disregard for the rights of others is also acting knowingly because the law considers recklessness or reckless behavior to be the equivalent of a state of mind which embraces an intent to deceive, manipulate or defraud.

INSTRUCTION NUMBER 21A

In this connection, one who had a duty to publicly disclose a fact which has not been properly disclosed, has a continuing duty to disclose it so long as it is material and remains undisclosed; he also has a duty to correct a previously-made public misrepresentation or misleading statement of a material fact known to him, if he knows that such a misrepresentation or misleading statement has been made, as long as the facts involved continue to be material and not corrected in a proper public manner.

INSTRUCTION NO. 22

The law does not require that each and every opinion considered or held by officers, directors, employees, or attorneys employed by a company such as Union Electric Company be disclosed in the prospectus and other releases or reports. An

opinion may have to be disclosed if it: (a) relates to existing material facts or future prospects; (b) is fully formed; and (c) represents the position of the company. A tentative or an initial reaction of one or more individuals not in a dominant position in a company, even if reduced to writing, does not usually represent the fully formed opinion of the company itself. In determining whether or not any given conclusion, reaction or statement was, in fact, an opinion regarding existing material facts or future prospects which should have been included in the prospectus and other releases or reports, you should consider whether the given thought or expression was rendered with conviction, the importance of the subject matter, whether there were other inconsistent opinions which applied to the same subject, and whether the view once expressed remained the same as of the time formed or expressed.

APPENDIX M

Damage Instructions

Nos. 6, 9

INSTRUCTION NO. 6

If a preponderance of the evidence does not support each essential element of plaintiffs' damage claim, then the jury should find against the plaintiffs as to that claim.

INSTRUCTION NO. 9

In determining plaintiffs' damages, if any, plaintiffs may recover the difference between the price at which the Series 2005 Bonds were sold on March 19, 1975, and the fair price for which the Bonds would have sold if the information that was misrepresented or not disclosed had then been known.

You may consider any matters in evidence which may bear on the fair value of the Series 2005 Bonds at that time.

APPENDIX N

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

80-196C (3)

Harold Harris, et al.,
Plaintiffs,

v.

Union Electric Company,
Defendant.

VERDICT

We, the jury in the above entitled cause, find the issue of liability in favor of: (Check One)

(Plaintiffs) ✓ or (Defendant)

Mary M. Lowes
Foreperson

Dated this 18 day of
October, 1984.

APPENDIX O

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-0196C (3)

Harold Harris, Continental Casualty Company, and National Fire Insurance Company of Hartford, individually and as representatives of all of the holders of the $70,000,.000 First Mortgage Bonds of Union Electric Company, 10½%, Series due March 1, 2005 as of April 11, 1978,

Plaintiffs,

v.

Union Electric Company,

Defendant.

VERDICT

We, the jury in the above-entitled action, assess Plaintiffs' damages in the sum of $2,716,240 (enter amount of damages, if any) against defendant Union Electric Company.

Gregory Mosley
Foreperson of the Jury

Dated: 11-14-84

APPENDIX P - FACT SUMMARY

In late 1976 and early 1977, Union Electric began to explore the concept of refunding some of its long-term debt [T. 4-15, 17], including the Series 2005 Bonds [T. 4-72, 73]. At that time, Union Electric still considered the Series 2005 Bonds to be non-refundable in any fashion. [T. 5-117], and was unaware of any ability to refund the Series 2005 Bonds at a lower interest rate through the use of the Maintenance Fund. [T. 4-19, 20] Convinced that the Series 2005 Bonds were "firmly within the call protection" [T. 3-115; Ex. #59] on March 4, 1977, Mr. Merle Welshans, Union Electric Vice President of Finance, so advised the Executive Vice President of the Company [T. 3-104; 4-19, 20; Ex. #59] Union Electric management shared this viewpoint. [T. 5-117, 118; 6-78; Ex. #59]. Mr. Friel, petitioner's Controller, to whom the opinion refers, (A-13, n. 7) testified, while looking at a final prospectus: "I can't recall exactly what I believed then, but I can see the words that I read many many times in 1975. And they mean the same thing to me today as they meant in '75 or vice versa. I couldn't read them any different then than I read them now. And it says the bonds are callable under the Maintenance Fund." [Tr. 5-41] However, he did not consider the possibility of a redemption through a cash deposit to the Maintenance Fund until after a conversation with his counterpart at Florida Power & Light Co., several years after the sale. [Tr. 5-56, 5-57, 5-58, 5-59].

(2)

Supreme Court, U.S.
FILED
JUL 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2036

In The
Supreme Court of the United States
October Term, 1985

UNION ELECTRIC COMPANY,

Petitioner,

vs.

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY, a corporation, and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a corporation, individually and as representatives of all of the holders of the $70,000,000 first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of April 11, 1978,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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34pp

QUESTIONS PRESENTED

I. Whether the Eighth Circuit's holding that the prospectus failed to disclose material facts concerning the exceptions to the "no-call" feature of the bond contract was correct and based upon sound principles of construction and creates any conflict with other circuits or prior decisions of this court on important issues of federal securities law?

A. Whether the Eighth Circuit's holding that the prospectus failed to disclose material facts concerning the exceptions to the "no-call" feature of the bond contract was correct and based upon sound principles of construction?

B. Whether the Eighth Circuit's decision is in conflict with the decision of the Fifth Circuit in Broad v. Rockwell International Corp., with that of the Second Circuit in Fershtman v. Schectman, or with its own decision in St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.?

II. Whether the Eighth Circuit's holding properly employed an out-of-pocket measure of damages and is in conflict with the weight of authority or with § 28(a) of the Securities Exchange Act of 1934?

III. Whether the Eighth Circuit's holding that the class purchased "in connection with" the fraudulent conduct of Union Electric is in conflict with Blue Chip Stamps v. Manor Drug Stores because the plaintiffs' bringing this action and the class members were found to have been purchasers and because the purchasers were causally connected to the fraudulent conduct?

IV. Whether the Eighth Circuit exceeded the appropriate scope of judicial review and relied on a theory not submitted to the jury in affirming the District Court's decision to exclude evidence which was irrelevant and immaterial to the issue of Plaintiffs' damages?

A. Whether the Appellate Court exceeded the appropriate scope of appellate review?

B. Whether the evidence excluded by application of the "second investment decision" rule was irrelevant and immaterial to the issue of Plaintiffs' damages?

TABLE OF CONTENTS

	Page No.
Questions Presented	i
Table of Contents	iii
Table of Authorities Cited	v
Opinion Below	1
Statement	1
Reasons for Denying the Writ	2
I. THE WRIT SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT'S HOLDING THAT THE PROSPECTUS FAILED TO DISCLOSE MATERIAL FACTS CONCERNING THE EXCEPTIONS TO THE "NO-CALL" FEATURE OF THE BOND CONTRACT WAS CORRECT AND BASED UPON SOUND PRINCIPLES OF CONSTRUCTION AND CREATES NO CONFLICT WITH OTHER CIRCUITS OR THE DECISIONS OF THIS COURT ON IMPORTANT ISSUES OF FEDERAL SECURITIES LAWS	3
A. THE EIGHTH CIRCUIT'S HOLDING THAT THE PROSPECTUS FAILED TO DISCLOSE MATERIAL FACTS CONCERNING EXCEPTIONS TO THE "NO-CALL" FEATURE OF THE BOND CONTRACT WAS CORRECT AND BASED UPON SOUND PRINCIPLES OF CONSTRUCTION.	3
B. THE EIGHTH CIRCUIT'S DECISION DID NOT HOLD PETITIONER LIABLE UNDER RULE 10b-5 FOR EXERCISING A CONTRACTUAL RIGHT, BUT FOR ENGAGING IN A SCHEME AND COURSE OF BUSINESS TO DEFRAUD, AND IS NOT IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN BROAD v. ROCKWELL INTERNATIONAL CORP., WITH THAT OF THE SECOND CIRCUIT IN FERSHTMAN V. SCHECTMAN, OR WITH ITS OWN DECISION IN ST. LOUIS UNION TRUST CO. v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.	9

TABLE OF CONTENTS—Continued

Page No.

II. THE EIGHTH CIRCUIT'S HOLDING EMPLOYED AN OUT-OF-POCKET MEASURE OF DAMAGES AND IS NEITHER IN CONFLICT WITH THE WEIGHT OF AUTHORITY NOR WITH SECTION 28(a) OF THE SECURITIES EXCHANGE ACT OF 1934. ____ 15

III. THE EIGHTH CIRCUIT'S HOLDING THAT THE CLASS PURCHASED "IN CONNECTION WITH" THE FRAUDULENT CONDUCT OF UNION ELECTRIC IS NOT IN CONFLICT WITH BLUE CHIP STAMPS v. MANOR DRUG STORES BECAUSE THE PLAINTIFFS BRINGING THIS ACTION AND THE CLASS MEMBERS WERE FOUND TO HAVE BEEN PURCHASERS AND BECAUSE THE PURCHASERS WERE CASUALLY CONNECTED TO THAT FRAUDULENT CONDUCT. ____ 17

IV. THE EIGHTH CIRCUIT DID NOT EXCEED THE APPROPRIATE SCOPE OF JUDICIAL REVIEW BECAUSE THE THEORY RELIED ON BY THE CIRCUIT COURT WAS SUBMITTED TO THE JURY AND DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO EXCLUDE EVIDENCE WHICH WAS IRRELEVANT AND IMMATERIAL TO THE ISSUE OF PLAINTIFFS' DAMAGES. ____ 21

A. THE APPELLATE COURT DID NOT EXCEED THE APPROPRIATE SCOPE OF APPELLATE REVIEW. ____ 21

B. THE EVIDENCE EXCLUDED BY APPLICATION OF THE "SECOND INVESTMENT DECISION" RULE WAS IRRELEVANT AND IMMATERIAL TO THE ISSUE OF PLAINTIFFS' DAMAGES. ____ 25

Conclusion ____ 27

TABLE OF AUTHORITIES

CASES: **Page**

Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97 (5th Cir. 1974) 6

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 725 (1975) 17, 18, 21

Broad v. Rockwell International Corp., 642 F.2d 929 (5th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 965 (1981) 7, 8, 9, 11, 12, 13

Conley v. Gibson, 355 U.S. 41, 47-48 (1957) 23

Fershtman v. Schectman, 450 F.2d 1357 (2d Cir. 1971) 11, 13, 14

Franklin Life Insurance Co. v. Commonwealth Edison Co., 451 F.Supp. 602 (S.D. Ill. 1978), *aff'd*, 598 F.2d 1109 (7th Cir.), *cert. denied*, 444 U.S. 900 (1979) 8

Harris v. American Investment Co., 523 F.2d 220, 228 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) 26, 27

Lucas v. Florida Power and Light Co., 765 F.2d 1039 (11th Cir. 1985) 5, 6, 8

St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 562 F.2d 1040 (8th Cir. 1977) 9, 11, 12, 13

Shapiro v. Midwest Rubber Reclaiming Co., 626 F.2d 63 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1980) 27

Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13 (1971) 19, 20

OPINION BELOW

The opinion of the court of appeals is reported at 787 F.2d 355, and is reproduced as Appendix A to Petitioner's Petition for Writ of Certiorari. References to the court of appeals opinion will be cited as "Op.", with reference to the page number in Appendix A to the Petition.

o

STATEMENT

Respondents object to the purported statements of fact, appearing at pages 3-7 of the Petition and as Appendix P, as being woefully incomplete and so selective as to be misleading. For example, Petitioner states that "in the state court action, the Missouri Court of Appeals, Eastern District, held the petitioner had the contractural right to redeem and to refund the bonds in the manner it had proposed" [Pet p.4], and that "the prospectus describes the bond contract including the "no call" limitation, the Improvement Fund and the Maintenance Fund." [Pet. p.6]

What the Missouri court actually held was that Union Electric could use Maintenance Fund cash to redeem bonds under Article VIII, § 8 of the original indenture. [A-52-3, 56-7] The Missouri court specifically declined to rule on any issue of prospectus disclosure [A-42], and noted that "the Prospectus and disclosure issues are not properly before us." [A-58, n.7]

No mention of this Article VIII, § 8 redemption right, which is what Union Electric attempted in April, 1978, appears anywhere in the prospectus. [A-12]

Respondents would refer the Court to the court of appeals opinion for an accurate and complete rendition of the facts pertinent to the issues of the case.

REASONS FOR DENYING THE WRIT

The Petitioner raises six different arguments under four separate points in its Petition for Certiorari, which are fraught with contortions and mischaracterizations of the Eighth Circuit's Opinion and of the authorities the Petitioner cites in support of its position on the issues discussed. The text of the Petitioner's "Reasons for Granting the Writ" comes dangerously close to an attempt to "hoodwink" this Court. Each one of Petitioner's arguments and contentions is completely without merit and fails to demonstrate any cogent reason why this Court should review the judgment and Opinion of the Eighth Circuit in this case. Respondent's arguments are arranged and numbered so as to correspond with the arrangement and numbering of the points in Petitioner's Petition for Writ of Certiorari.

I.

THE WRIT SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT'S HOLDING THAT THE PROSPECTUS FAILED TO DISCLOSE MATERIAL FACTS CONCERNING THE EXCEPTIONS TO THE "NO-CALL" FEATURE OF THE BOND CONTRACT WAS CORRECT AND BASED UPON SOUND PRINCIPLES OF CONSTRUCTION AND CREATES NO CONFLICT WITH OTHER CIRCUITS OR THE DECISIONS OF THIS COURT ON IMPORTANT ISSUES OF FEDERAL SECURITIES LAWS.

A. THE EIGHTH CIRCUIT'S HOLDING THAT THE PROSPECTUS FAILED TO DISCLOSE MATERIAL FACTS CONCERNING THE EXCEPTIONS TO THE "NO-CALL" FEATURE OF THE BOND CONTRACT WAS CORRECT AND BASED UPON SOUND PRINCIPLES OF CONSTRUCTION.

The Petitioner argues that the prospectus disclosed the exceptions to the "no-call" features of the bond contract and attacks the Eighth Circuit's conclusion to the contrary by, among other things, the presentation of a slightly "altered" version of that Court's reasoning. The Petitioner states that "[t]he Opinion (at p. A-11) concludes that **both** interpretations of the cover page are plausible . . . ." [Pet. p.10] The statement is lifted from a discussion of the opposing grammatical construction advanced by the parties concerning the interpretation of the "call protection provision on the cover page of the prospectus." [Op. A-10] The statement referred to was in fact a reference to the ambiguous and misleading nature of the prospectus [Op. A-11,12]; viz.:

> Although the plaintiffs' and U.E.'s interpretations of the cover page provision are plausible, we do not limit

> our determination to this single provision. To the contrary, we consider the prospectus **in its entirety,** as we assume the jury did, **together with** the intention of the parties. When the cover page provision is read together with the redemption provisions on pages three and twenty-eight, and with the Improvement and Maintenance Fund provisions on page twenty-nine, it is clear that the jury could have reasonably found that the prospectus is ambiguous and misleading in that it omits material facts concerning the call protection.

Petitioner contends that the Court's conclusion "cannot be supported by the language of the prospectus"; that its finding of ambiguity "relied upon testimony relating to the intentions of the parties in 1975"; and that "the bondholders were . . . advised of the features of the bond contract in the prospectus." [Pet. p.10] The Opinion succinctly sets forth the gravamen of its conclusion that the prospectus is misleading [Op. A-12], and exposes the vacuity of Petitioner's position here:

> Article VIII, section 8 of the bond contract has been judicially construed by the Missouri Court of Appeals to authorize lower cost refunding at the special redemption prices. Harris v. Union Electric Co., 622 S.W.2d at 251. **The prospectus, however, does not mention Article VIII, section 8.** The prospectus is misleading in that it does not adequately disclose the authorization set forth in section 8, while giving the impression that refunding the bonds at a lower rate of interest before March 1, 1985 is prohibited. The redemption provision on page twenty-eight of the prospectus prohibits lower cost refunding at the Regular Redemption Prices, and the bond contract allows such refunding at the Special Redemption price. **This "protection" is a sham.** The Regular Redemption Prices are premiums, but the Special Redemption Price is fixed at par. **A restriction on lower cost refunding at a premium with no such restriction at par affords**

> **no meaningful protection against call.** UE would never call the bonds at a premium if it could call them at the lower price of par. **This renders the premium price list on page twenty-eight of the prospectus meaningless and misleading,** since it represents prices that would never be paid. Finally, **the prospectus is misleading in that it failed to disclose UE's right to directly call the bonds through the Maintenance Fund.** The bond contract, however, has been judicially construed to provide UE with such a right. Yet, the Maintenance Fund provision on page twenty-nine of the prospectus indicates that funds deposited in the Maintenance Fund may be used indirectly to redeem bonds by first transferring the money to the Improvement Fund. This distinction is important because had UE redeemed the bonds indirectly through the Maintenance Fund according to the provisions on page twenty-nine, it could not have avoided paying the premium prices. The jury reasonably could have found that the prospectus is misleading and ambiguous in that it omits material facts that would have adequately disclosed the call protection of the bonds. (Emphasis supplied).

Petitioner relies heavily on *Lucas v. Florida Power and Light Co.*, 765 F.2d 1039 (11th Cir. 1985), and states that "the testimony at trial of the instant case was that Union Electric officials were not aware of the possibility of a maintenance fund redemption until after the Florida Power & Light Company redeemed its bonds." [Pet. p.10] Not only is this statement not true, but the factual issues on this point were resolved by the jury against Petitioner. As noted by the Court in its opinion [Op. A-13, n.7]:

> . . . The evidence is inconsistent concerning this point. Although UE contends that none of its officials were aware of the possibility of calling the bonds in the manner in which it planned, Mr. Friel, a vice president and the controller at UE, testified that he was aware of such possibility in 1975. Even if UE officials did

not deliberately leave the meaning of the prospectus obscure, they were obviously aware of uncertainties, the meaning of which were decided at a later date to suit UE's purposes.

The Petitioner's discussion of *Lucas v. Florida Power and Light Co.*, supra, does nothing to refute the Eighth Circuit's decision in the instant case. Whether the language in the Florida Power & Light prospectus was "boilerplate" or not has no bearing on that case's applicability to *Lucas'* at bar. In *Lucas*, the prospectus specifically referred to Florida Power's ability to redeem the bonds in the fashion it did, language which is notably absent in the Union Electric prospectus. *Id.*, at 1041; *c.f.*, Pet. pp.A-59-70. In addition, that case involved a **redemption**, whereas the present case involves a **refunding**. [Op. A-23] Nowhere in *Lucas* does the Eleventh Circuit hold that the call protection provision in that prospectus disclose the possibility of an early **refund**. The Eighth Circuit's distinction of *Lucas* on its facts clearly makes the ultimate holding in that case inapplicable here. If *Lucas* is taken to stand for the proposition that the Court must look to the language of the prospectus to determine whether the prospectus was misleading it still does not conflict with what the Eighth Circuit did in this case. Here, having examined the prospectus and having found the ambiguities noted above, the Eighth Circuit referred to testimony concerning the intent of the parties, only to find that the prospectus should be resolved as representing the bonds in question as having solid protection against lower interest cost refunding for ten years. [Op. A-14-15] Such ambiguities were not present in *Lucas*.

Petitioner's reliance on *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97 (5th Cir. 1974), also is of

no help to its position. In that case, the Court found the prospectus to be not misleading based upon a finding that although a material fact was not disclosed on the cover page of the prospectus, it was disclosed elsewhere in the prospectus. In the instant case, the Court took pains to make it clear that its findings that the prospectus was ambiguous and misleading were based upon a reading of the prospectus as a whole, not just of the cover page. [Op. A-11-12] Despite the Petitioner's contention that "the disclosures appear at three places including the cover page of the prospectus" [Pet. p.13], there is no disclosure of the Article VIII, § 8 redemption right, which is what is involved in this case, that appears anywhere at all in the prospectus. [Op. A-12]

Petitioner also attempts to manufacture a conflict between the Eighth Circuit's decision and that of the Fifth Circuit in *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir. 1981) (en banc) *cert. denied*, 454 U.S. 965 (1981), apparently arguing that Union Electric was under no "duty to disclose **in a detailed fashion** the indenture's provisions for more remote future contingencies". [Pet. p.14] (Emphasis added). The point is irrelevant since not only were the exceptions in Article VIII, § 8 of the Union Electric bond contract not disclosed in a detailed fashion, they were not disclosed at all. The prospectus does not even mention that Article VIII, Section 8 exists. [Op. A-12] In addition, the prospectus goes on to give the impression that the refund procedure allowed by the section is in fact prohibited. *Id.* In addition, the *Broad* opinion is inapplicable for the simple reason that the very creation of the undisclosed contract right in that case occurred **after** the alleged fraud was

committed, where here the fraud involved not only the failure to disclose the Article VIII, § 8 redemption right, but also the use of that right by UE after duping the bondholders into a false sense of security that no such right existed.

The Petitioner's reliance on *Franklin Life Insurance Co. v. Commonwealth Edison Co.*, 451 F. Supp. 602 (S.D. Ill. 1978), *aff'd*, 598 F.2d 1109 (7th Cir.), *cert. denied*, 444 U.S. 900 (1979), is also misplaced. In that case, the Court found a failure to establish "that defendant omitted a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading because the material facts omitted were not objective, but were rather subjective, involving defendant's intent and beliefs concerning **interpretation** of the redemption provision". *Id.*, at 608-609; Pet. p.14. This is not the situation present in the instant case. The Eighth Circuit went to great lengths to point out specifically how the prospectus as a whole was misleading and which misrepresentations and omissions rendered it so. [Op. A-12] The facts omitted here were not subjective at all. The Plaintiffs-Respondents have never contended that the prospectus was misleading for failure to disclose the intents or beliefs of the Defendant-Petitioner, and the Circuit Court did not base its holdings on any such contention or finding. The Eighth Circuit's description of the fraud [Op. A-15] makes it clear that neither *Lucas* nor *Broad* have any relevance to this case, nor do those decisions conflict in any way with that in this case:

> Based on the language of the prospectus, the testimony of the parties expressing their intentions, and the testimony of the market experts, we conclude

that the plaintiffs produced sufficient evidence for the jury to have found that the prospectus is ambiguous and misleading in that it omitted material facts that would have adequately disclosed U.E.'s right to call the bonds, in violation of Rule 10b-5(b). We also conclude that the evidence is sufficient for the jury to have found that these omissions were part of a larger scheme or course of business to defraud the bondholders. **To knowingly implement a plan in 1978 to call bonds that were previously intended and marketed as having solid call protection until 1985, constitutes a course of business, or a device, scheme, or artifice that operates as a fraud on the bondholders in violation of Rule 10b-5(a) and (c).** Therefore, UE's conduct falls within all three subparagraphs of Rule 10b-5. (Emphasis supplied).

Petitioner's Point I, A is without merit.

B. THE EIGHTH CIRCUIT'S DECISION DID NOT HOLD PETITIONER LIABLE UNDER RULE 10b-5 FOR EXERCISING A CONTRACTUAL RIGHT, BUT FOR ENGAGING IN A SCHEME AND COURSE OF BUSINESS TO DEFRAUD, AND IS NOT IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN BROAD v. ROCKWELL INTERNATIONAL CORP., WITH THAT OF THE SECOND CIRCUIT IN FERSHTMAN v. SCHECTMAN, OR WITH ITS OWN DECISION IN ST. LOUIS UNION TRUST CO. v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

Petitioner attempts to characterize the Eighth Circuit's decision as imposing 10b-5 liability for the mere exercise of a contractual right. It attempts to castigate the Court for its finding of scienter, and follows with a selective presentation of what it denominates as the reasoning of the Court's opinion. In fact, Petitioner's pre-

sentation is nothing more than a thinly disguised attempt to obfuscate the real issues of the case and mislead this Court as to the factual situation which constitutes the fraud.

Petitioner begins by attempting to show that the Court based its finding of scienter on the existence of reckless conduct alone [Pet. p.16]:

> It was UE's intent that the bonds would possess solid protection against call for 10 years. To represent and market the bonds as possessing such protection and then implement a plan to call the bonds within the 10 year period, constitutes at the very least recklessness on UE's part. [Op. A-22, n. 12]

However, the Court's finding of scienter was not based on recklessness at all, but rather on intentional conduct, as a reading of the opinion clearly shows [Op. A-21]:

> . . . There is substantial evidence demonstrating the UE knew that the plan was contrary to its representation in the prospectus concerning the call protection. Several UE officials testified that the company, without a doubt, initially intended to provide "solid protection" against call for ten years. The evidence indicated that Mr. Grainger, one of UE's Advisory Directors, vehemently opposed the plan as "subordinating moral responsibility for financial gain," and cautioned UE's president that the "contract with the Bondholders should be kept inviolate." UE's Vice President of Finance, Mr. Welshans, testified that the company was well aware that the plan was contrary to the protection that the underwriters, the bondholders, and Union Electric all mutually intended the bonds to possess. The evidence also indicated that UE only hesitated long enough to assure itself that it could re-enter the bond market at a later date without any trouble. Once UE observed that

> FP & L's plan did not adversely affect its ability to re-enter the market, UE implemented its plan. . . . Clearly, the evidence is sufficient from which the jury could have found that UE acted with the intent to defraud the bondholders.

Petitioner's major argument is basically that it could not have violated Rule 10b-5 because it was only attempting to exercise a contract right, and that the Eighth Circuit's opinion thus conflicts with *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir. 1981); *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040 (8th Cir. 1977); and *Fershtman v. Schectman*, 450 F.2d 1357 (2d Cir. 1971). However, the facts show that Petitioner's conduct cannot honestly be characterized in so innocent a fashion.

Union Electric, the bondholders and the underwriters intended the bonds to have a solid protection against call for 10 years. [Op. A-13, n. 7; 14; 15; 21; 22, n. 12; 23; 24] Union Electric, through the prospectus, represented to the public that the bonds would indeed possess that protection, [Op. A-11-15] Union Electric marketed the bonds based upon the existence of the solid call protection. [Op. A-15, n. 8] Plaintiffs purchased the bonds in reliance upon that representation. [Op. A-17] Union Electric later implemented a plan which it knew was contrary to the representations made in the prospectus. [Op. A-21] It was the implementation of that plan which rendered the representation in the prospectus concerning solid call protection false and misleading. [Op. A-19] Hence, Union Electric "certainly intended to defraud the bondholders of this protection when they announced the plan to call the bonds before the ten-year period had run". [Op. A-21]

To paraphrase—All the parties intended the bonds to have solid protection against call for ten years, and indeed the securities were bought and sold with all parties believing that such protection existed. So far as everyone involved was concerned, the protection described in the prospectus was real, and indeed was inflating the price of the bonds as it had from the time the initial issue was offered and sold. Then, three years later, Union Electric in effect announces: "We know the bonds were supposed to have solid call protection for ten years; we know we are the ones who said that they would and we know that you only paid the price you did at the yield offered because of that protection; we know that we have taken full advantage of your belief that these bonds were non-refundable for 10 years; but we have just discovered a way to call the bonds early that we didn't know about before, and although we know that it is inconsistent with what all of us intended the bond contract to be, we're going to do it despite our representation to the contrary in the prospectus and regardless of the effect upon your investment."

As the Circuit Court pointed out, *Broad* and *St. Louis Union Trust Co.* are readily distinguishable from the instant case in that "[u]nlike the situations in *Broad* and *St. Louis Union Trust Co.*, the parties' intentions in this case were contrary to the subsequently construed contractual right in question. It's undisputed that U.E. marketed the bonds as possessing solid call protection for ten years." [Op. A-15, n. 8] The Eighth Circuit recognized, and the Petitioner ignores, the fact that the Article VIII, § 8 right that Union Electric attempted to exercise was not disclosed and was a material fact. Neither case sup-

ports the Petitioner's position, nor holds that an issuer can omit disclosures of material provisions of the terms of a bond, and then later exercise such rights to the detriment of the bondholders. These two cases can further be distinguished by the fact that in both *Broad* and *St. Louis Union Trust Co.*, the rights in question were created by contracts which were independent of the security in question. Here, the refunding right under Article VIII, § 8 springs from the bond contract itself, which created the security in question. Union Electric's reliance on *Broad* and *St. Louis Union Trust Co.* is obviously misplaced.

Petitioner also argues that the Eighth Circuit's decision is in conflict with *Fershtman v. Schectman,* 450 F.2d 1357 (2d Cir. 1971). In that case, there was a discrepancy between provisions in a limited partnership agreement and in the certificate of limited partnership. The general partners brought about termination of the partnership in accordance with the provision in the limited partnership agreement. Plaintiffs' claims under Rule 10b-5 were dismissed because of lack of federal jurisdiction and failure to state a claim under Rule 10b-5. The reasons given by the Court were many. None of the alleged misrepresentations and omissions, save one, were material nor did they cause damage. *Id.*, at 1360. The one misrepresentation which may have been material was made negligently and did not cause damage. *Id.*, at 1361. Furthermore, the partnership agreement and the certificate of limited partnership were both sent to and received by the plaintiffs. The only misrepresentation which might have been considered to be material was in the form of

an attorney's opinion letter concerning the discrepancy between two documents. The letter was written after the partners had already signed the agreement and may never have come to the plaintiffs' attention at all. *Id.*, at 1360-1361. The most important factual distinction between the *Fershtman* case and the case at bar is that the document which purportedly gave rise to the right exercised (the partnership agreement), was disclosed to the plaintiffs in that case, whereas in the instant case, there was no disclosure of the Article VIII, § 8 right. The circumstances in *Fershtman* are so different from those in the present case that not even the incomplete statements quoted by the Petitioner from that opinion can apply here.

The Court's holding that Union Electric's conduct in representing and marketing the Series 2005 bonds as having solid call protection for 10 years, and then announcing their intention to implement a plan to call those bonds before the ten-year period had expired with intent to defraud the bondholders, constitutes a course of business, or a device, scheme, or artifice that operates as a fraud on the bondholders in violation of Rule 10b-5(a) and (c), [Op. A-14-15; 22, n. 12], is correct and does not conflict with the holdings of the Fifth or Second Circuits, nor the prior decisions of the Eighth Circuit. The Petitioner's Point I, B is also without merit.

II.

THE EIGHTH CIRCUIT'S HOLDING EMPLOYED AN OUT-OF-POCKET MEASURE OF DAMAGES AND IS NEITHER IN CONFLICT WITH THE WEIGHT OF AUTHORITY NOR WITH SECTION 28(a) OF THE SECURITIES EXCHANGE ACT OF 1934.

Petitioner contends that the Eighth Circuit held that the announcement to call the bonds caused the plaintiffs' damages [Pet. p.19]; that the Plaintiffs were allowed to recover for a temporary market drop and paper loss [Pet. p.20]; and that "the plaintiffs and the class did not sustain any actual damages." [Pet. p.19] None of these statements are true.

Petitioner admits that the proper measure of damages is the "out-of-pocket loss, namely, the excess of what [they] paid over what [they] got". [Pet. p.19] The Court's Opinion makes it abundantly clear that this is precisely the measure of damages used in this case [Op. A-18-19]:

> The proper measure of damages in this case is the difference between purchase price and the actual value of the bonds on the date they were issued. This remedy is best suited to the harm in this case because it represents the reduction in the value of the bonds caused by the lack of call protection. Although the plaintiffs purchased the bonds for less than 101, the bonds were worth much less because the call protection that the plaintiffs thought they were purchasing did not exist. The plaintiffs paid more for the bonds than they were actually worth.

There is no need at this point to reiterate the Eighth Circuit's discussion of authority for choosing the measure it did, [Op. A-17-19], as the Petitioner's argument, mis-

construing the Circuit Court's holding as it does, fails to challenge it.

The Opinion cites "ample evidence" introduced by the Plaintiffs-Respondents to show that, in order for Union Electric to sell the bonds without the call protection at the 10½% interest rate, it would have had to do so at a substantially lower price. The damages then were measured by the "reduction in the initial purchase price of the bonds that would have been necessary in order to sell them at 10½% without the call protection". [Op. A-19] Logically, that price value differential not only existed at the time the bonds were issued, but continued to exist until the absence of the call protection became known and the market adjusted the price of the bonds to reflect the absence of the call protection. Plaintiffs submitted substantial evidence of what this differential was, of which the market drop was but one factor. The Circuit Court agreed that the reduction in the market value of the bonds on the date the fraud was discovered evidence was that "fairly represents the reduction in the initial purchase price of the bonds that would have been necessary in order to sell them at 10½% without the call protection." [Op. A-19] The "market drop" then was not the measure of damages at all, but rather it represented evidence which was used to help measure "the difference between the purchase price of the bonds and their true value on the date purchased" as being $120. [Op. A-19] The jury's award of $40 per bond was obviously based on its consideration of other evidence as well, and is living proof that the jury did not consider the market drop to be the measure of damages *per se*, as Petitioner now contends.

The Circuit Court's holding, that damages are to be measured by the difference between the actual value of the bonds and the purchase price on the date of issue and that the "market drop" was evidence properly used to ascertain the amount of that difference because it fairly represented the reduction in price necessary to sell the bonds on the date of issue at 10½% and without the call protection, is a proper one allowing Plaintiffs-Respondents to recover only those "actual damages" allowed under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) and under the weight of judicial authority interpreting that section. Petitioner's Point II is without merit and must fail.

III.

THE EIGHTH CIRCUIT'S HOLDING THAT THE CLASS PURCHASED "IN CONNECTION WITH" THE FRAUDULENT CONDUCT OF UNION ELECTRIC IS NOT IN CONFLICT WITH BLUE CHIP STAMPS v. MANOR DRUG STORES BECAUSE THE PLAINTIFFS BRINGING THIS ACTION AND THE CLASS MEMBERS WERE FOUND TO HAVE BEEN PURCHASERS AND BECAUSE THE PURCHASERS WERE CASUALLY CONNECTED TO THAT FRAUDULENT CONDUCT.

There is no doubt that a threshold requirement of a Rule 10b-5 action is that the Plaintiffs, in order to maintain a private action for damages under the Rule, must be either purchasers or sellers of a security. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 725 (1975). There really is no legitimate issue as to the standing of the Plaintiffs-Respondents as purchasers of the Series 2005 bonds. The Petitioner is attempting, however, to also

cite the ubiquitous *Blue Chip Stamps* as authority for its contention that **all** members of the class must be shown to have been purchasers. No such contention was made to the trial court, and thus is not properly preserved for review. However, *Blue Chip Stamps*, does not hold that such a showing must be made with respect to each individual member of a class, nor does Petitioner offer any authority to such effect. Petitioner attempts to impose an impossible burden on representatives of large classes which would defeat the very reason for the existence of a class action in the first place.

In fact, despite the definition of the class in the instant case, the Eighth Circuit did find that the class members were "purchasers". The Circuit Court's statement in footnote 11 on page 20 of the Opinion does not, as Petitioner contends, substitute a general "dealing in the security test" for the purchaser or seller requirement. The body of text to which this footnote refers states [Op. A-20]:

> . . . we believe that UE's fraudulent conduct "touches" the class members' **purchases** of their bonds. . . . If the call protection had been accurately disclosed before these members of the class **purchased** their bonds, they would have paid less for the bonds or demanded a higher yield. Clearly, these members of the class **purchased** their bonds in connection with UE's fraudulent conduct." (Emphasis supplied).

It is clear that the Circuit Court found that those class members "dealt in the security to which the omissions concerning the call protection relate" as "purchasers". [Op. A-20, n.11]

Petitioner next attacks the Eighth Circuit's finding that Petitioner's fraudulent conduct "touches" the class

members' purchases because the market price "reflected the misleading call protection" and because these purchasers would have "paid less" or "demanded a higher yield" had the call protection been "accurately disclosed". [Op. A-20; Pet. for Cert. 22]. The Eighth Circuit's finding was based on the holding of this Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971), that a showing that the fraudulent conduct "touches" the purchase or sale of securities satisfies the "in connection with" requirement.

The Petitioner begins by stating in footnote 9 on page 22 of its Petition for Certiorari that the Eighth Circuit's finding is factually inaccurate because it was not shown that the class members made their purchases at the time the bonds were issued in 1975. This contention is absurd, especially in light of the Circuit Court's discussion of the issue of reliance [Op. A-16-17] (which, incidentally, is not challenged by the Petitioner), and of the issue of the measure of damages [Op. A-18-19] (which, as discussed in the previous section of this Answer, the Petitioner completely misconstrues). The effect of the misleading omissions and representations in the prospectus, indeed of the entire course of fraudulent conduct, on the market price of the bonds was present not only on the day of issue, but continued until the fraud was discovered in April, 1978. Throughout that entire period the market price of the bonds reflected the belief in the existence of the call protection, so that anyone who purchased the bonds during that time period would have been paying a premium for call protection that didn't exist. Since the class members who purchased after the issue date but before April 11, 1978 relied on the market, affected as it was by the fraud,

in making their decisions to invest in the bonds, the fraud "touched" all of the purchases made within that period. The fact that the class members would have paid less or demanded a higher yield had the call protection been accurately disclosed was as true the day before Union Electric announced its plans to call the bonds as it was on the day the bonds were issued.

The Petitioner also contends that the theory used by the Eighth Circuit relying on *Bankers Life* "ignores the 'in connection with' requirement by substituting a new and unidentified standard". [Pet. p.22] Nothing could be further from the truth. The standard used by the Eighth Circuit in its discussion of this issue is taken directly from this Court's Opinion in *Bankers Life.* Neither the standard itself, nor the use of it, ignores the "in connection with" requirement, but rather are based upon that requirement. Though the requisite "touching" was not defined in *Bankers Life,* the Plaintiffs-Respondents have no doubt that whatever connection this Court had in mind as meeting this test, the "causal connection between the alleged fraud and the purchase or sale" would, no doubt, be involved. Even with this in mind, the "in connection with" requirement was satisfied in this case, as held by the Circuit Court.

The Plaintiffs-Respondents agree that the purchase or sale of securities occurring prior to the fraudulent conduct or after the fraudulent conduct is exposed would probably not be made "in connection with" that fraudulent conduct. Although the Petitioner contends that the Eighth Circuit found that it was the 1978 redemption announcement which constituted the fraud, the Opinion demonstrates otherwise. The Eighth Circuit specifically found that the

Petitioner's entire course of conduct from the representations in the prospectus in 1975, through the announcement to refund the bonds in 1978, constituted a "course of business and scheme or artifice which operated as a fraud on the bondholders". [Op. A-7, 14-15, 21, 24] Accordingly, since the named plaintiffs and class members all purchased their bonds during this period, all of those purchases were made "in connection with" the fraudulent conduct of the Petitioner which also occurred during that same period. The important thing is that the purchases were made during the course of conduct by the Petitioner which was prohibited by Rule 10b-5. That the petitioner may not have decided until later to taint this course of conduct by using it to defraud the bondholders does not sever the connection between the conduct and the purchases it procured.

There was no misapplication or erosion of *Blue Chip Stamps* by the Eighth Circuit in this case. There is no merit to Petitioner's contentions to the contrary in Point III of its Petition for Certiorari.

IV.

THE EIGHTH CIRCUIT DID NOT EXCEED THE APPROPRIATE SCOPE OF JUDICIAL REVIEW BECAUSE THE THEORY RELIED ON BY THE CIRCUIT COURT WAS SUBMITTED TO THE JURY AND DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO EXCLUDE EVIDENCE WHICH WAS IRRELEVANT AND IMMATERIAL TO THE ISSUE OF PLAINTIFFS' DAMAGES.

A. THE APPELLATE COURT DID NOT EXCEED THE APPROPRIATE SCOPE OF APPELLATE REVIEW.

The Petitioner argues that the Eighth Circuit based its decision in this case upon a theory which was neither

pled, proven nor submitted, thereby exceeding the permissible scope of appellate review, and denying Petitioner its 7th Amendment right to trial by jury. Petitioner's contention is inaccurate and therefore must fail. Furthermore, the 7th Amendment argument was never presented to the Court of Appeals, and is not preserved for review.

In paragraph 21 of the First Amended Complaint [A-86-90], and in paragraph 31 of the Amendment to First Amended Complaint [A-112], the Plaintiffs-Respondents did indeed plead a series of allegations that were sufficent to put the Defendant-Petitioner on notice of a claim that the entire course of conduct alleged, [which includes the making of the representations in the 1975 prospectus, the announcement of intent to refund the bonds in 1978, and all the related conduct in between], was in violation of Rule 10b-5. While the pleadings did aver that the material misrepresentations and omissions in the 1975 prospectus and the announcement to call the bonds in 1978 would each, standing alone, constitute violations of various provisions of Rule 10b-5, it also averred that these discreet violations were connected and that they made up a course of conduct which also violated the Rule. That the entire course of conduct by the Petitioner from March, 1975 through April, 1978 constituted a scheme or artifice to defraud and a course of business operating as a fraud against the bondholders was implicit in the allegations found in the First Amended Complaint and the Amendment to First Amended Complaint. In fact, the damage allegations in Count II specifically refer to "the aforesaid devices, schemes, and artifices to defraud, and the aforesaid acts, practices and courses of business which operate as a fraud and deceit upon the Plaintiffs and Class Members." [A-104] It is noteworthy that

Petitioner never attacked the sufficiency of this pleading, nor asked for more definite statement—a tacit admission on its part that it was given fair notice of the Plaintiffs' claims and the grounds on which these claims were based. This is all that is required under the "notice pleading" permitted by the Federal Rules of Civil Procedure. *Conley v. Gibson,* 355 U.S. 41, 47-48 (1957). That the Petitioner may not have recognized the existence of this theory in the First Amended Complaint and the subsequent Amendment thereto can only be attributed to an inability to "see the forest for the trees" and does not change the fact that this theory was contained in the pleadings.

As for Petitioner's claim that this theory of liability was not supported by "any facts in the record", [Pet. p.24], a reading of the voluminous facts cited throughout the Eighth Circuit's Opinion shows that quite the opposite is true. In fact, all of the evidence concerning the Petitioner's conduct during this period supports this theory.

The theory relied upon by the Eighth Circuit was also submitted to the jury in Liability Instruction Number 13 [A-114], which clearly shows that the conduct of Union Electric, as established by the evidence produced at trial, was subjected to the jury's scrutiny under all three provisions of Rule 10b-5. The theory that Petitioner's conduct constituted a "device, scheme, or artifice to defraud" or a "practice or course of business which operated as a fraud or deceit upon any person in connection with the purchase of a security" was not abandoned as the Petitioner claims. In fact, the Eighth Circuit's Opinion points out that not only did the material omissions in the prospectus constitute conduct in violation of Rule 10b-5(b), but also that the entire course of conduct, including the use of the

ambiguous and misleading prospectus, constituted both a course of business and a device, scheme, or artifice which operated as a fraud on the bondholders in violation of Rule 10b-5(a) and (c) so that all three provisions of the rule were violated. [Op. A-14-15] Obviously, the theory of liability relied on by the Circuit Court was submitted to the jury in Liability Instruction Number 13.

Finally, Petitioner argues that the theory relied upon by the Eighth Circuit was not argued on appeal. At their appellate argument, the Plaintiffs-Respondents referred to the conduct of the Petitioner as constituting both "disclosure fraud" and "transaction fraud". This was a shorthand way of referring to the various subparagraphs of Rule 10b-5 violated by the particular discreet instances of conduct involved: "disclosure fraud" referring to that conduct which violates Rule 10b-5(b), while "transaction fraud" refers to that conduct which violates Rule 10b-5(a) and (c). A substantial section of the Plaintiffs-Respondents' brief on appeal, as well as of their oral argument, was devoted to the discussion of how the misrepresentations and omissions in the prospectus, by themselves, constituted "disclosure fraud". However, the Respondents were also careful in their discussion of a "transaction fraud" on pages 26 through 36 of their appellate brief to point out the importance of the representations made in the 1975 prospectus to the overall fraudulent scheme, device, or artifice and course of business employed and engaged in by the Petitioner. Nowhere during the course of this entire appellate process did Petitioner raise the objections that it now presents to this Court. The Eighth Circuit certainly appreciated this interrelationship, argued by the Plaintiffs-Respondents, and the way it served to bind the individual,

discreet instances of conduct by Union Electric into a continuous course of conduct violating the "transaction fraud" provisions of Rule 10b-5, also argued by the Plaintiffs-Respondents, even if the Petitioner did not.

The judgment of the Eighth Circuit was based solely upon facts which were pled, proven, submitted, and resolved by the jury in the District Court below and argued on appeal. Therefore the holding of the Eighth Circuit that Union Electric's entire course of conduct from March of 1975 through April of 1978 as it related to the series 2005 bonds constituted a course of business and a scheme, device, or artifice that operated as a fraud on the bondholders in violation of Rule 10b-5(a) and (c) and was properly within the scope of appellate review. There is no merit to Petitioner's argument in Point IV, A of its Petition for Certiorari.

B. THE EVIDENCE EXCLUDED BY APPLICATION OF THE "SECOND" INVESTMENT DECISION" RULE WAS IRRELEVANT AND IMMATERIAL TO THE ISSUE OF PLAINTIFFS' DAMAGES.

The Petitioner's argument on this point suffers from the same fatal flaw as its argument in Point II of its Petition for Certiorari concerning the issue of damages, namely it is based upon an incorrect characterization of what constituted the Plaintiffs-Respondents' damages in this case. As discussed earlier in Point II of this Answer, the damages consisted of the difference between the actual value of the bonds and the price paid for them on the date of issue, not the "market drop" itself. [Op. A-18-19] The Circuit Court made it plain that it was applying the **principle** of the "second investment decision" rule as

stated in *Harris v. American Investment Co.*, 523 F.2d 220, 228 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), although the *Harris* Court's enunciation of the rule was in response "to the argument that the investor should have mitigated his damages by selling his stock after discovering the fraud". [Op. A-27] The Circuit Court thus continued to recognize that the "market drop" did not constitute the damages in this case. If it were, the Circuit Court here would have been responding to the same mitigation argument as was the Court in *Harris*. The Plaintiffs' "second investment decision" to hold the bonds, knowing that they carried no call protection against lower interest cost refunding, was wholly unrelated to their initial decision to purchase the bonds, believing they did carry such protection, and thus was wholly unrelated to Union Electric's fraudulent conduct. Any fluctuations in market price after that time, then, are not relevant to the issue of damages in a cause of action under Rule 10b-5. This, coupled with the measure of damages used in the instant case, is why the "recovery of the bonds two months later, and the continued receipt of interest payments have no bearing on the measure of the plaintiffs' damages caused by UE's fraudulent conduct". [Op. A-27] Recovery of the bond price occurred after the "second investment decision" and the interest payments were the same after discovery of the fraud as they were before. The evidence offered by the Petitioner was therefore irrelevant and immaterial to the issue of how much more the Plaintiffs-Respondents paid for the bonds than they were actually worth as measured by that difference on the date the bonds were issued. As an aside, it certainly would have been interesting to see what the Peti-

tioner's position on this point would have been had the market price of the bonds continued to fall.

The Eighth Circuit correctly decided that the District Court did not abuse its discretion in excluding evidence of the continued interest payments and of the recovery of the market price of the bonds two months after the discovery of Union Electric's fraudulent conduct, because that evidence was irrelevant and immaterial to the issue of Plaintiffs-Respondents' damages. The Eighth Circuit's rulings on the exclusion of such evidence was in keeping with its previous rulings on the same issue in *Harris v. American Investments Co.*, 523 F.2d 220, 228 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) and *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1980). This Court has twice before refused to grant certiorari to review this issue and should do so again. Petitioner's Point IV, B in its Petition for Certiorari is without merit.

CONCLUSION

For the foregoing reasons, Union Electric's Petition for a Writ of Certiorari to review the judgment and Opinion of the Eighth Circuit should be denied.

Respectfully submitted,

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